165-263

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 4 Original.

EX PARTE: IN THE MATTER OF ED. MILLS,
PETITIONER.

Petition for a Writ of Habeas Corpus.

JUDD & DETWEILER, PRINTERS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. —. Original.

EX PARTE: IN THE MATTER OF ED. MILLS,
PETITIONER.

Petition for a Writ of Habeas Corpus.

To the Hon. MELVILLE W. FULLER,
Chief Justice of the Supreme Court of the United States:

Your petitioner, Ed. Mills, says that he was indicted on the 16th day of July, 1889, in the United States district court for the western district of Arkansas, for the crime of carrying on the business of a retail liquor dealer in the Indian country without having paid the special tax required by law.

Said offense is alleged in said indictment to have been committed on the 7th day of July, 1889; that on the said 16th day of July, 1889, your petitioner was also indicted in said district court for the crime of introducing liquor into the Indian country, which is also alleged to have been done on the 7th day of July, 1889; that afterwards, to wit, on the said 16th day of July, he was sentenced by the said district court for the said crime of retailing liquor in the Indian

country to the penitentiary at Columbus, Ohio, for the term of one year, and to pay a fine of one hundred dollars.

That on the same day last named he was sentenced by the said district court to the said penitentiary for the term of six months, and to pay a fine of fifty dollars.

Your petitioner attaches hereto true and perfect copies of said indictments and sentences, with the indorsements thereon, and refers to and makes the same a part of this petition.

That in pursuance of said sentences and in virtue thereof he was incarcerated in said penitentiary, where he still remains.

Your petitioner further states that he was not sentenced to hard labor, as under the law he could not have been, for the offenses named, and that the said offenses, as he believes, were committed in the sole and exclusive jurisdiction of the United States court for the Indian Territory.

Your petitioner further states that the said district court had no jurisdiction of the said crimes at the time he was indicted and sentenced; that he is now confined in the said penitentiary and is held under said sentences contrary to the laws and Constitution of the United States and in violation of his personal liberty.

Wherefore your petitioner prays that, in consideration of the premises, he be granted a writ of *habeas corpus*, that he may be dealt with according to law, and that upon final hearing he may be discharged from custody.

And as in duty bound he will ever pray.

UNITED STATES OF AMERICA,

Western District of Arkansas:

The affiant, Ann Mills, says that she is over twenty-one years old; is a resident of the city of Fort Smith, Ark.; that she is the lawful wife of Ed. Mills, the above-named pe-

titioner; that she believes the statements contained in the foregoing petition are true.

her
ANN x MILLS.
mark.

Sworn to and subscribed before me the 26th day of August, 1889.

[SEAL.] STEPHEN WHEELER,
Clerk U. S. Circuit Court, W. D. A.

In the Supreme Court of the United States.

Ex Parte ED. MILLS.

May it Please the Court:

The prisoner was indicted for selling and introducing whisky in the Indian country in July, 1889. The act of Congress of March the first, establishing a United States court in the Indian country, conferred exclusive jurisdiction upon that court in all cases not punishable by imprisonment at hard labor. (See fifth section of said act as to the jurisdiction of this court for the Indian Territory.) In the United States court at Paris, Texas, the United States court at Wichita, Kansas, and the Federal court at Fort Smith, Arkansas, there seems to be much difference of opinion, some holding that such cases as the one herein involved are cognizable at or in the Muscogee court; others that they are cognizable in the United States court at Fort Smith.

That the courts named may be relieved of the embarrassments suggested, it is important that the question be settled at once, as your honors will readily see. The decisions are somewhat numerous in favor of the proposition that although a prisoner may have been sentenced simply to imprisonment without hard labor, yet that the prison-keeper afterwards has the right to establish rules whereby hard

labor may be imposed; but while this may be so I take it to be a correct proposition of the law as to the settlement of the question of jurisdiction between two or more different courts that the law as to the right of the court in pronouncing sentences should at once determine the jurisdiction. If, therefore, the court at Fort Smith had no right under the law to impose hard labor by the sentence itself, then certainly the court at Muscogee, which has jurisdiction exclusive in all cases where hard labor is not imposed by law, is the one wherein such cases as the one at bar are cognizable. I take it for granted that the courts in determining the question of jurisdiction could not, in advance of the establishment of prison rules, anticipate what the prison-keeper was going to do in the adoption of rules, and in that way determine the law of jurisdiction. The law must determine the jurisdiction and not the probability or the possibility of the future establishment of any given prison rule by the prison-keeper. The sentence itself, which is nothing more nor less than the result of law, must determine the question. If, therefore, the court at Fort Smith had no right under the law to impose hard labor by its sentence against the prisoner herein, then this must determine the jurisdiction of the Fort Smith court. If this proposition is not true, then the court at Muscogee has no jurisdiction whatever of any criminal case, because, upon the assumption of the Fort Smith court, the prison-keeper at Muscogee, who, having the right to impose hard labor and actually does impose it, would oust the Muscogee court of its entire criminal jurisdiction. The prison-keeper, though an officer of the law, does not belong to the legislalative branch of this Government, and therefore his prison rules are not the law of this country; hence, I take it that the law which governs the question is absolutely contained in the fifth section of the Indian Territory court bill above referred to. The criminal jurisdiction of the court at Muskogee by the bill which created it extends all over the In-

dian country. The indictment herein charges the prisoner with having committed the crimes therein mentioned long subsequent to the passage of the said court bill. Section 2139 of the Revised Statutes of the United States determines just what the sentence of the law shall be in such cases as are described in the indictments herein. Under this section of the law no hard labor can be imposed by any court.

The indictment for retailing liquor is drawn under the general revenue law of the United States, and while the general revenue law extends over the Indian country, yet it certainly does not in such cases as this, because the indictment charges that the selling was without a license. He, the prisoner, is charged with not doing that which the law says no man can under the law do, because no man can obtain a license to sell whisky in the Indian Territory. The section of the United States statute last above quoted forbids the introduction of spirituous liquors into that country under any pretense whatever. The indictment would not be sufficient unless it negatived the idea of the prisoner's having obtained a license.

The Attorney General, I suppose, would have the right to direct that prisoners sentenced by the United States court at Muskogee should be sent to a penitentiary, just as he has done with reference to the prisoners sentenced by the United States court at Fort Smith. Then, if the latter court can sentence prisoners in cases mentioned in this indictment, the United States court at Muscogee could do the same thing; hence, to determine which of these courts has the right to try such cases, we must look to the law which forbids either to impose hard labor by their sentences.

I believe, therefore, the prisoner is illegally held, and should be discharged from further custody.

Respectfully submitted.

THOS. MARCUM,
Attorney for the Prisoner.

UNITED STATES OF AMERICA,
Western District of Arkansas.

In the District Court. May Term, A. D. 1889.

UNITED STATES
versus
ED. MILLS, Retail Liquor Dealer.

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present—

That Ed. Mills, on the 7th day of July, A. D. 1889, at the Creek Nation, in the Indian country, within the western district of Arkansas aforesaid, did unlawfully engage in and carry on the business of a retail liquor dealer without having first paid the special tax required and provided by law, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

WM. H. H. CLAYTON,
U. S. District Attorney, Western District of Arkansas.

[Endorsed:] Copy. No. 3060. United States *versus* Ed. Mills, retail liquor dealer. A true bill. A. C. Embry, foreman. Witnesses: Ben. White, Ike Welch. Filed July 16, 1889. Stephen Wheeler, clerk, by I. M. Dodge, D. C.

UNITED STATES OF AMERICA,
Western District of Arkansas.

In the District Court. May Term, A. D. 18—.

UNITED STATES
versus
ED. MILLS.
Introducing Spirituous Liquors into the Indian Country.

The grand jurors of the United States of America, duly

selected, empaneled, sworn, and charged to enquire in and for the body of the western district of Arkansas, upon their oath present—

That heretofore, to wit, on the 7th day of July, A. D. 1889, at the Creek Nation, in the Indian country, in the western district of Arkansas aforesaid, one Ed. Mills then and there did unlawfully introduce into the Indian country, in said district, spirituous liquors, to wit, one gallon of whiskey, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

WM. H. H. CLAYTON,
U. S. District Attorney, Western District of Arkansas.

[Endorsed:] No. 3061. United States *versus* Ed. Mills. Int., &c. A true bill. A. C. Embry, foreman. Witnesses: Ben. White & Ike Welch. Filed July 16th, 18—. Stephen Wheeler, clerk, by I. M. Dodge, D. C.

In the District Court of the United States for the Western District of Arkansas. August Term, 1889.

TUESDAY MORNING, 8½ O'CLOCK,
July 16th, A. D. 1889.

Court met pursuant to adjournment.

Present: The Honorable Isaac C. Parker, judge of the district and circuit courts of the United States for the western district of Arkansas.

UNITED STATES *versus* ED. MILLS. } No. 3060. Indictment for Being a Retail Liquor Dealer in the Indian Country.

On motion of Wm. H. H. Clayton, Esq., attorney for the western district of Arkansas, the said defendant, Ed. Mills, was brought to the bar of the court in custody of the mar-

shal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon his plea of guilty, heretofore entered by him in this cause on the 16th day of July, A. D. 1889, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon, the premises being seen and by the court well and sufficiently understood, it is considered by the court here that the said Ed. Mills, for his misdemeanor aforesaid, be imprisoned in the Ohio State penitentiary, situated at Columbus, in the State of Ohio, for the term and period of one year, and that he pay to the United States of America a fine of one hundred dollars, together with all their costs in and about this prosecution laid out and expended, and that they have execution therefor.

It is further considered that the marshal of the western district of Arkansas, in whose custody the said Ed. Mills is now here committed, receive and safely keep and convey the body of the said Ed. Mills hence to said penitentiary in the State of Ohio without delay, and deliver him to the custody of the keeper of said penitentiary, who will receive and safely keep the said Ed. Mills in jail in execution of the sentence aforesaid and in conformity with the same for the full period of the time aforesaid.

And it is further ordered that the clerk of this court furnish the marshal of this district with two duly certified copies of this judgment, sentence, and order, one of which shall be delivered to the keeper of said penitentiary and the other returned by the marshal to this court with a full and true account of the execution of the same.

I certify that I have served the within writ by delivering the within-named —— ——, together with a copy of this writ, into the custody and hands of the warden of the —— State penitentiary at ——, in the State of ——, on the —

day of ——, 188–, and have his receipt therefor endorsed thereon, as within I am commanded.

——— ———,

United States Marshal, Western District of Arkansas.

[Endorsed :] United States *versus* Ed. Mills. Mittimus.

UNITED STATES *vs.* ED. MILLS. } No. 3061. Indictment for Introducing Liquors in the Indian Country.

On motion of Wm. H. H. Clayton, Esq., attorney for the western district of Arkansas, the said defendant, Ed. Mills, was brought to the bar of the court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon his plea of guilty, heretofore entered by him in this cause on the 16th day of July, A. D. 1889, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon, the premises being seen and by the court well and sufficiently understood, it is considered by the court here that the said Ed. Mills, for his misdemeanor aforesaid, be imprisoned in the Ohio State penitentiary, situated at Columbus, in the State of Ohio, for the term and period of six months, and that he pay to the United States of America a fine of fifty dollars, together with all their costs in and about this prosecution laid out and expended, and that they have execution therefor.

And it is further considered by the court that the above term of imprisonment shall commence and date from the expiration of a one-year term of imprisonment which the said Ed. Mills was this day sentenced to undergo upon indictment No. 3060.

It is further considered that the marshal of the western district of Arkansas, in whose custody the said Ed. Mills is

now here committed, receive and safely keep and convey the body of the said Ed. Mills hence to said penitentiary, in the State of Ohio, without delay, and deliver him to the custody of the keeper of said penitentiary, who will receive and safely keep the said Ed. Mills in jail in execution of the sentence aforesaid and in conformity with the same for the full period of the time aforesaid.

And it is further ordered that the clerk of this court furnish the marshal of this district with two duly certified copies of this judgment, sentence, and order, one of which shall be delivered to the keeper of said penitentiary and the other returned by the marshal to this court with a full and true account of the execution of the same.

I, Stephen Wheeler, clerk of the district court of the United States in and for the western district of Arkansas, hereby certify that the foregoing is a true and correct copy of the indictments, judgment, sentence, and order in the above-entitled cause, as the same appears of record.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Fort Smith, in said district, this 23rd day of August, A. D. 1889.

[SEAL.] STEPHEN WHEELER, *Clerk*,
By I. M. DODGE, *D. C.*

[Endorsed:] United States *versus* Ed. Mills. Mittimus.

Received at the —— State penitentiary at ——, State of ——, this — day of ——, A. D. 18—, from —— ——, marshal of the United States for the western district of Arkansas, the body of the within-named defendant, —— ——, together with a copy of this writ.

—— ——.

I certify that I have served the within writ by delivering the within-named —— ——, together with a copy of this writ, into the custody and hands of the warden of the —— State penitentiary at ——, in the State of ——, on the — day of ——, 188–, and have his receipt therefor endorsed thereon, as within I am commanded.

—— ——,

United States Marshal, Western District of Arkansas.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 4. Original.

EX PARTE: IN THE MATTER OF ED. MILLS, PETITIONER.

RETURN TO RULE TO SHOW CAUSE.

FILED DECEMBER 2, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 4. Original.

EX PARTE: IN THE MATTER OF ED. MILLS, PETITIONER.

PETITION FOR A WRIT OF HABEAS CORPUS.—RETURN OF THE WRIT TO SHOW CAUSE.

To the honorable judges of the Supreme Court of the United States:

Now comes E. G. Coffin, warden of the Ohio State penitentiary at Columbus, Ohio, and in reply to the rule of court requiring him to show cause why writ of habeas corpus should not issue in the above entitled cause, respectfully showeth:

That on the 1st day of August, A. D. 1889, he received the body of the said Ed. Mills from the marshal of the United States for the western district of Arkansas, together with the duly certified copy of judgment and sentence and a mittimus of the United States district court for the western district of Arkansas (copy of which said sentence and mittimus are hereto annexed and made a part hereof, marked "Exhibit A"), directed to him as such warden of the Ohio State penitentiary, and commanding him to receive and safely keep the said Ed. Mills in the Ohio State penitentiary at Columbus, Ohio, in execution of the sentence
2 aforesaid, and in conformity with the same for the full period of one year as therein set forth.

And that the cause of the detention of the said Ed. Mills is the said sentence and warrant of commitment, and by virtue of the Revised Statutes of the United States in that behalf enacted, and that the said term and period of imprisonment has not yet expired and terminated.

E. G. COFFIN,
Warden of the Ohio Penitentiary.

UNITED STATES OF AMERICA,
Southern District of Ohio, Eastern Division, ss:

Before me, the undersigned authority, personally appeared E. G. Coffin, who, being duly sworn, says that he is the warden of the Ohio State penitentiary at Columbus, Ohio, and that the facts and allegations set forth in the foregoing return are true to the best of his knowledge and belief.

[SEAL.]

J. W. FIRESTONE,
Notary Public, Franklin County, O.

3 EXHIBIT A.

In the district court of the United States for the western district of Arkansas.

May term, A. D. 1889, Tuesday morning, 8½ o'clock, July 16th, 1889.

Court met pursuant to adjournment. Present, Hon. Isaac Parker, judge of the district and circuit courts of the United States for the western district of Arkansas.

UNITED STATES *versus* ED. MILLS. } No. 3060. Indictment for being a retail liquor dealer in the Indian country.

On motion of William H. H. Clayton, esq., atty. for the western district of Arkansas, the said defendant Ed. Mills was brought to the bar of the court, in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon his plea of guilty heretofore entered by him in this cause, on the 16th day of July, A. D. 1889, shall not now be pronounced against him, he says he has nothing other or further to say than he has heretofore said.

Whereupon the premises being seen, and by the court well and sufficiently understood, it is considered by the court here that the said Ed. Mills, for his misdemeanor aforesaid, be imprisoned in the Ohio State penitentiary, situated at Columbus, in the State of Ohio, for the term and period of one year, and that he pay to the United States of America a fine of one hundred dollars, together with all their costs in and about this prosecution laid out and expended, and that they have execution therefor.

It is further considered that the marshal of the western district of Arkansas, in whose custody the said Ed. Mills is now here committed, receive and safely keep and convey the body of the said Ed. Mills

4 hence to the said penitentiary in the State of Ohio without delay, and deliver him to the custody of the keeper of the said penitentiary, who will receive and safely keep the said Ed. Mills in jail in execution of the sentence aforesaid and in conformity with the same for the full period of time aforesaid.

And it is further ordered that the clerk of the court furnish the marshal of this district with two duly certified copies of this judgment, sentence and order, one of which shall be delivered to the keeper of said penitentiary and the other returned by the marshal of this court, with a full and true account of the execution of the same.

Court met pursuant to adjournment. Present, the Hon. Isaac Parker, judge of the district and circuit courts of the United States for the western, district of Arkansas.

UNITED STATES *versus* ED. MILLS. } No. 3061.—Indictment for introducing liquors into the Indian country.

On motion of William H. H. Clayton, esq., atty. for the western district of Arkansas, the said defendant, Ed. Mills, was brought to the bar

of the court, in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon his plea of guilty, heretofore entered by him, by the jury in this case, on the 16th day of July, A. D. 1889, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon the premises being seen, and by the court well and sufficiently understood, it is considered by the court here that the said Ed. Mills, for his misdemeanor aforesaid, be imprisoned in the Ohio State penitentiary, situated at Columbus, in the State of Ohio, for the term and period of 6 months, and that he pay to the United States of
5 America a fine of $50, together with all their costs in and about his prosecution laid out and expended, and that they have execution therefor.

And it is further considered by the court that the above term of imprisonment shall commence and date from the expiration of a one-year term of imprisonment which the said Ed. Mills was this day sentenced to undergo upon the indictment No. 3060.

It is further considered that the marshal of the western district of Arkansas, in whose custody the said Ed. Mills is now here committed, receive and safely keep and convey the body of the said Ed. Mills hence to said penitentiary in the State of Ohio, without delay, and deliver him to the custody of the keeper of said penitentiary, who will receive and safely keep the said Ed. Mills in jail in execution of the sentence aforesaid and in conformity with the same for the full period of time aforesaid.

And it is further ordered that the clerk of this court furnish the marshal of this district with two duly certified copies of this judgment, sentence, and order, one of which shall be delivered to the keeper of said penitentiary and the other returned by the marshal to this court, with a full and true account of the execution of the same.

I, Stephen Wheeler, clerk of the district court of the United States in and for the western district of Arkansas, hereby certify that the foregoing is a true and correct copy of the judgments, sentence, and order in the above entitled case as the same appears of record.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Fort Smith, in said district, this 16th day of July, A. D. 1889.

STEPHEN WHEELER, *Clerk.*
By I. M. DODGE, *D. C.*

6 (Indorsed:) Department of Justice. November 27, 1889; Case No. in U. S. Supreme Court. Ex parte: Ed. Mills, plaintiff, *vs.* Defendant. Filed , 18 . clerk of the court. Attorney for

7 (Indorsed:) Supreme Court, U. S., 1889, October Term. No. 4 original. Ex parte, in the matter of Ed. Mills, petitioner. Return to rule.

Office Supreme Court, U. S.; filed Dec. 2, 1889. James H. McKenney, clerk.

United States Supreme Court
FILED
APR 3 1890
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

EX PARTE: IN THE MATTER OF ED. MILLS, PETITIONER. No. —. Original.

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE APPLICATION.

WM. A. MAURY,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

EX PARTE: IN THE MATTER OF ED. MILLS, PETITIONER. No. —. Original.

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE APPLICATION.

At the May term, 1889, of the district court of the United States for the western district of Arkansas, the petitioner was indicted (1) for the offense of carrying on the business of a retail liquor dealer "at the Creek Nation in the Indian country," without having paid the special tax required by law, and (2) for the offense of unlawfully introducing spirituous liquors into the Indian country.

The petitioner pleaded guilty to both indictments.

On the indictment for carrying on the business of a retail liquor-dealer in the Indian country without having paid the special tax the petitioner was sentenced to imprisonment in the Ohio State penitentiary at Columbus for one year and to pay a fine of $100 and costs.

The sentence on the second indictment, for unlawfully introducing spirituous liquors into the Indian country, was that the petitioner should be imprisoned in the said penitentiary for six months and pay a fine of $50 and costs, this term of imprisonment to commence from the expiration of the said sentence for one year.

The indictment for retailing liquor without a license was based on section 3242, Revised Statutes of the United States, which declares that

> Every person who carries on the business * * * of a retail liquor-dealer * * * without having paid the special tax as required by law, shall, for every such offence, be fined not less than one thousand dollars nor more than five thousand dollars, and *be imprisoned not less than six months nor more* than two years. * * *

The indictment for unlawfully introducing liquor into the Indian country was based on section 2139, Revised Statutes, which provides that the offense of unlawfully introducing liquor into the Indian country "shall be punishable by *imprisonment for not more than two years* and by a fine of not more than three hundred dollars."

But there is another section of the Revised Statutes that has a material bearing on this case, namely, section 5541, which provides that whenever any person convicted of any offense against the United States "is sentenced to imprisonment for a period longer than a year" the court may order such sentence to be executed in a "State jail *or penitentiary*." (See, generally, Chapter 9, R. S.)

It is claimed, as a ground for the petitioner's discharge, that the court that tried and sentenced him had no jurisdiction over the offences for which he was indicted, but that the court which possessed the jurisdiction to try him was the court established in the Indian Territory by the act of Congress of March 1, 1889 (25 Stat., 783).

The fifth section of this act provides—

> That the court hereby established shall have exclusive original jurisdiction over all offenses against the laws of the United States committed within the Indian Territory, as in this act defined, not punishable by death or *by imprisonment at hard labor*.

It is said, in the petitioner's behalf, that inasmuch as the law does not prescribe "hard labor" as part of the punishment for the offences charged in the indictment, under which sentence was passed, those offences fell within the jurisdiction of the Territorial court.

The answer to that position seems to be, that as persons convicted of the offences described in the indictments *are liable to be sentenced to imprisonment in a penitentiary*, the offences in question are infamous, in the sense of the Constitution of the United States, and can only be prosecuted on the presentment or indictment of a grand jury. But the statute creating the court for the Indian Territory omits to give the court power to summon a grand jury, although it does make adequate provision for petit juries (Secs. 9 to 15).

The only law of the United States regulating the impaneling of grand juries is section 808,

Revised Statutes, but this law gives no authority to any Territorial court to impanel a grand jury. This court held, in *Reynolds* v. *United States* (98 U. S., pp. 153, 154), that section 808 had no application to the courts of a Territory.

It follows, then, that to hold that the act of Congress of March 1, 1889 (*supra*), took away the jurisdiction of the district court of the western district of Arkansas in the offenses covered by the indictments would be to hold those offenses dispunishable when committed within the jurisdiction of the court for the Indian Territory.

Congress had not the power to give that Territorial court power to entertain prosecutions without presentment or indictment by a grand jury of offenses that might be punished by imprisonment in a penitentiary with or without hard labor.

The Constitution (Amendment V) has put its interdict on the exercise of any such power. *Ex parte* Wilson (114 U. S., 417) *Mackin* v. *United States* (117 U. S., 357).

Indeed the offenses in question were punishable with hard labor, inasmuch as this court has

held that, under the several sections of chapter 9, Revised Statutes:

> Where the statute requires imprisonment alone the several provisions which have just been referred to place it within the power of the court, at its discretion, to order execution of its sentence at a place *where labor is exacted as part of the discipline and treatment of the institution or not, as it pleases. Thus, a wider range of punishment is given, and the courts are left at liberty to graduate their sentences so as to meet the ever-varying circumstances of the cases which come before them. Ex parte* Karstendick (93 U. S., 399).

According, now, to this ruling, "hard labor" is a *possible punishment in any case where a person may be sentenced to imprisonment in a penitentiary.*

The penitentiary at Columbus, Ohio, in which the petitioner is confined, has been designated by the Attorney-General as the one in which prisoners sentenced by the United States courts for the western district of Arkansas should be imprisoned, and under the laws of Ohio and the rules of that prison hard labor is exacted of persons sentenced to be imprisoned there by those courts.

The argument presented in favor of the petitioner fails to show any provision of law under which the court for the Indian Territory could impanel a grand jury, which is the main, if not the only, question in the case.

It is not necessary to do more than to refer the court to the carefully prepared opinions of Judge Parker appended to this brief.

WM. A. MAURY,
Assistant Attorney-General.

APPENDIX.

CASES IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS, BEFORE THE HON. ISAAC PARKER, DISTRICT JUDGE.

EX PARTE MCCLUSKY. EX PARTE KITTIE BROWN.

On application for habeas corpus.

These cases are alike, and they will be considered together.

The petitioners state that on the — day of September, 1889, information was filed against them in the United States court for the Indian Territory, by the district attorney for the Indian Territory, charging them with larceny; that said petitioners were afterwards arraigned before the said court, and that they then and there pleaded guilty to said charge; that afterwards judgment was entered on said plea of guilty, and by said judgment said McClusky was sentenced by said court to imprisonment in the jail at Muscogee for the period of six months, where he now is; and said Kittie Brown was sentenced to the reform school at Washington, D. C., but at the time of her filing a petition for a writ she was incarcerated in the jail at Muscogee. Each petitioner alleges in his and her petition for a writ of habeas corpus restraint of liberty contrary to the Constitution and laws of the United States, and upon that ground they pray the issuance of writs of habeas corpus that they may be brought before this court and relieved of their illegal imprisonment.

M. M. Edmiston, William H. H. Clayton, United States attorney for petitioners, and Z. T. Walrond, United States attorney for the Indian Territory, for respondents.

The first question is, could these petitioners be pronounced guilty of the crime of larceny and sentenced to prison for said crime without being first charged with the crime by an indictment preferred by a legal grand jury?

Second. If this is a fundamental requisite, is the right to insist upon its being complied with one that may be waived by a party, and is it waived by a plea of guilty to a charge of larceny presented by an information?

Article V of the amendments to the Constitution provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury." * * *

Is larceny an infamous crime?

In *ex parte* Wilson (114 U. S., 426) the Supreme Court says:

> The question is whether the crime is one for which the statutes authorize the courts to award an infamous punishment, not whether the punishment ultimately awarded is an infamous one.

In *Mackin* v. *United States* (117 U. S., 352) the Supreme Court says:

> We can not doubt that at the present day imprisonment in a State prison or penitentiary, with or without hard labor, is an infamous punishment. It is not only so considered in the general opinion of the people, but it has been recognized as such in the legislation of the States and Territories as well as of Congress.

It is not necessary to make a punishment infamous that the law shall require that the party should in terms be sentenced to hard labor. If under the law he may be sentenced to a State prison or penitentiary, either with or without hard labor, his punishment is infamous. So says, in effect, *ex parte* Wilson, *supra*, and so says expressly *Mackin* v. *United States*, *supra*.

And why is not this a reasonable construction, when it is a fact of common knowledge that, by the laws and rules governing all State prisons and penitentiaries, hard labor is exacted of those who are sentenced there, and the Supreme Court, in *ex parte* Karstendick (93 U. S., 396) declares that all United States convicts are subject to the same discipline and treatment as convicts sentenced by courts of the State.

The punishment is no less infamous when the convict may, under the law, be put to hard labor in the prison, although not in terms sentenced to it, than when the sentence in obedience to the law sets it out.

The punishment is equally infamous in both cases. When the accused is in danger of being subjected to an infamous punishment if convicted, the crime of which he is accused is an infamous crime. (114 U. S., 417; 117 U. S., 348; *United States* v. *Tod.*, 25 Fed. Rep., 815.)

When is he in such danger? Why, in every case where the court under the law might sentence to a State prison or penitentiary.

Section 5541 provides:

> In every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year the court by which the sentence is passed may order the same to be executed in any State jail or penitentiary within the district or State where such court is held, the use of which jail or penitentiary is allowed by the legislature of the State for that purpose.

Section 5546 provides that—

> All persons who have been or who may hereafter be convicted of crime by any court of the United States, whose punishment is imprisonment, in a district or territory where at the time of conviction there may be no penitentiary or jail suitable for the confinement of convicts or available therefor, shall be confined during the term for which they have been or may be sentenced in some suitable jail or penitentiary in a convenient State or Territory to be designated by the Attorney-General.

Of course, when so designated it becomes the duty of the court to sentence the prisoners to the place so designated.

The only difference between these two sections relates to the class of cases where the judge may designate the place of imprisonment and the class where the Attorney-General may designate such place. The Attorney-General may designate the place of imprisonment in all cases where there is not a suitable jail or penitentiary for the confinement of prisoners in a district or territory where he is convicted.

Suppose the judge would in a case where he can designate fail to designate a State jail or penitentiary, and send the parties, as he has done with McClusky in this case, to a local jail, would that take away the infamous character of the offense? If this were so, the same act might be an infamous crime in one district and not an infamous crime in another, its character depending on whether the judges designated or failed to designate a State prison or penitentiary. So with all cases where persons are to be confined in State prisons designated by the Attorney-General. If he would designate a State penitentiary as the place of confinement of persons convicted in one district and fail to do so in another district the same crime would be infamous in one case while in the other it would be entirely free from that character.

The statement of these propositions shows they are not true.

Neither the judge nor the Attorney-General can at his pleasure determine the infamous character of an offense. The test is whether the statutes authorize the court to award an infamous punishment, not whether the punishment ultimately awarded is infamous. Whether the accused is in danger of being subjected to an infamous punishment.

If convicted of larceny he is, under the power of the Attorney-General, to designate the place of imprisonment in such danger.

By the rule established by the Supreme Court in *ex parte* Wilson and *Mackin* v. *United States* larceny becomes an infamous offense. It was infamous at the common law, not only because it was a crime which ex-

hibited particular turpitude and baseness of character, but because of the nature of its punishment as well.

Up to the 7 and 8 of George IV it was, if the property stolen was over the value of 12 pence, punishable with death. This was infamous punishment.

Then by the above statute it was punished with transportation to a penal colony, or two years' imprisonment and whipping, if a male, and that was certainly infamous punishment.

This was the condition of the common law of England at the time of the adoption of the fifth amendment to the Constitution.

I conclude that the crime of larceny is an infamous crime, and the person accused must be so accused by an indictment or presentment of a grand jury.

Can a party waive the right, and if so, is his plea of guilty to a charge contained in an information not authorized by the law a waiver of his right to be accused by an indictment.

A party can not waive a constitutional right when its effect is to give a court jurisdiction. (Hanes on Jurisdiction, secs. 11 and 12, a pony book.)

The fifth amendment to the Constitution, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury * * * provides for a requisite to jurisdiction. (*Ex parte Bain*, 121 U. S., p. 1; *Parkinson* v. *United States*, 121 U. S., 281.)

If the crime is of such a nature that an indictment to warrant a prosecution of the crime is required by the law, the court has no jurisdiction to try without such indictment. Can a party consent to jurisdiction? Can he by an agreement with the Government surrender his liberty for a stipulated time? Has any person a right to surrender his liberty in violation of a fundamental right, secured to him for the protection of the liberty of such person by the fifth amendment to the Constitution of the United States? No man or no power has the right to take away another's liberty, even though with consent, except by process of law. Due process of law

in a case like the one charged against petitioners means compliance by the Government with a fundamental requisite, such as that the party shall be charged with the crime in the way provided by the Constitution and laws of the United States. Liberty under such Constitution and laws is an inalienable prerogative, of which no man by mere agreement can divest himself. Any divesture not occurring by due process of law is null. (Wharton's Crim. Law, vol. 1, sec. 751.)

Mr. Cooley, in Constitutional Limitations, p. 181, says:

> A party may consent to waive rights of property, but the trial and punishment for public offences are not within the province of individual consent or agreement.

This means that by individual consent or agreement fundamental rights can not be waived.

The substantial constitution of the legal tribunal and the fundamental mode of its proceeding are not within the power of the parties. The court of appeals of New York, in *Cancuni* v. *The People* (1 N. Y. Rep. 36), said:

> Criminal prosecutions involve public wrongs, a breach and violation of public rights and duties which effect the whole community considered as a community in its social and aggregate capacity. * * *

The penalties or punishment for the enforcement of which they are a means to the end are not within the discretion or control of the parties accused; for no one has a right by his own voluntary act to surrender his liberty or part with his life. The state, the public, have an interest in the preservation of the liberties and lives of the citizens, and will not allow them to be taken away, when forfeited, as they may be without due process of law as a punshment for crimes. Criminal prosecutions proceed on the assumption of such a forfeiture, which to sustain them must be ascertained and declared as the law has prescribed. * * *

These considerations make it apparent that the right of a defendant in a criminal prosecution to affect by consent the conduct of the case should be made more

limited than in civil actions. It should not be permitted to extend as far as to make radical changes in great and leading provisions as to the organizations of the tribunals or the mode of proceeding prescribed by the Constitution and the laws. Effect may justly and safely be given to such consent in many particulars; and the law does, in respect to various matters, regard an act upon it as valid. Objections to juries may be waived; the court may be substituted for triers to dispose of challenges to juries; secondary in place of primary evidence may be received; admissions of facts are allowed; and in similar particulars, as well as in relation to mere formal proceedings generally, consent will render valid what without it would be erroneous. A plea of guilty to any indictment, whatever may be the grade of the crime, will be received and acted upon if it is made clearly to appear that the nature and effect are understood by the accused.

In such a case the preliminary investigation of a grand jury with the admission of the accusation the indictment is supposed to be a sufficient safeguard to the public interests."

The above decision most clearly declares the law governing a case where a fundamental right of the citizen is to be effected by a criminal proceeding, such right being one regulating the method of that proceeding.

Mr. Blackstone, volume 4, page 189, says: "The King has an interest in the preservation of all his subjects."

In this country the State and the law has such a great interest in the life and liberty of the citizen as to see to it that such life or liberty shall not be taken away, even with the consent of the citizen, in violation of one of the great constitutional fundamental requisites regulating the method to be adopted to deprive the citizen of his life or his liberty.

Mr. Blackstone, volume 1, page 133, again declares that the "natural life being an immediate donation of the Great Creator can not legally be disposed of or destroyed by any individual, neither by the person him-

self nor by any other of his fellow-creatures, merely upon their own authority."

So it is with the liberty of the citizen. It is a donation of the Great Creator and can not be taken by persons upon their own authority, even with the consent of the citizen whose liberty is taken, but it must be taken by the process of law.

None of the fundamental requisites to the proceeding which makes up due process of law can be so waived as to deprive the person whose liberty is taken from him of afterwards resorting to legal means to obtain his liberty.

In such a case as the one charged against these petitioners, the fundamental law of the land, the Constitution of the United States, requires that the charge be preferred by an indictment found by a legal grand jury.

The infirmity in the proceeding which resulted in their being sentenced to prison is that the proceeding is one against the Constitution and laws of the United States, one unknown to such laws, one created by the mere voluntary act of the parties; and it is in effect an attempt to adopt a species of arbitration to settle the question whether the petitioners have been guilty of offense against the United States.

This is not the way to ascertain this fact.

From the principles of this law which I have set out, as well as the reasons for these principles which I think are sustained by all the authorities which declare the law on the subject, these petitioners could not be legally deprived of their liberty by their pleading guilty to the charge of larceny preferred by an information, and by so doing they did not deprive themselves of the right to regain their liberty by habeas corpus.

It must therefore be held that they are restrained of their liberty without due process of law and against the Constitution and laws of the United States.

Therefore the writ must issue and the parties are entitled to a discharge by it from custody.

Ex Parte Farley, Ex Parte Wilson.

On rule to show cause why writs of habeas corpus should not issue.

The cases of the two petitioners are precisely alike and they will therefore be considered together.

In their petitions they allege that they were, on the —— day of September, 1889, indicted by a grand jury, so called, empaneled by the United States court for the Indian Territory, for the crime of larceny; that on the —— day of September, 1889, they were tried upon said indictment by a petit jury in said court. They were, by said jury, convicted on said charge. That on the 9th day of September, 1889, the court upon said verdict of guilty entered judgment against them, and sentenced them to one year's imprisonment in the jail at Muskogee, where they are now confined. That the said parties are now illegally imprisoned. That they are restrained of their liberty contrary to the Constitution and laws of the United States, because said indictment was found by a grand jury that had no legal existence, as it was empaneled without authority of law. That the court had no legal authority to empanel a grand jury. That the indictment found by it is a nullity. That they are entitled to the writ of habeas corpus, that the legality of their imprisonment may be inquired into.

M. M. Edmiston and William H. H. Clayton, United States district attorney, for petitioners; Z. T. Walrond in opposition to the petitioners.

This court has no jurisdiction by writ of error or appeal to pass even on the jurisdiction of the court at Muscogee. By such means it would have no right to inquire into the cause of imprisonment of a party restrained of his liberty, no matter how illegal such restraint might be. But if the illegality or restraint grows out of a sentence imposed, or any order of imprisonment which the court could not make for want of jurisdiction, the want of jurisdiction may be inquired into by this court by a habeas corpus proceeding; and

upon the hearing of such a case the court, or any judge thereof, may make such inquiry as is necessary to enable it to see whether the jurisdiction of the court has been exceeded, or that there is no authority to hold the petitioner under sentence.

The court may grant this great "writ of right" in every case where a party is restrained of his liberty anywhere in the territorial jurisdiction of the court, against the Constitution and laws of the United States, or the petitioner is deprived of his liberty without due process of law.

This may be so done by an order or proceeding of a State court, or any United States court. or by a person outside of a court, and if so done, in the territorial jurisdiction of a United States circuit or district court, such courts or any judge thereof may, upon proper application, issue a writ of habeas corpus to inquire into the jurisdiction of a court, or the want of authority in such court to restrain a party of his liberty.

The jurisdiction of the circuit and district courts within their territorial jurisdictions to issue this writ is the same as the Supreme Court of the United States within its territorial jurisdiction, which is the whole United States.

When the Supreme Court will review the proceedings of an inferior court by habeas corpus, a United States circuit or district court has the power, within their territorial jurisdictions, to inquire in a case where a party is restrained of liberty by the order of a court whether that court had jurisdiction to make the order or had authority to restrain the party of his liberty.

The state of case which must exist to warrant the invocation of this writ is clearly settled in *ex parte* Wilson (114, U. S., 421) and the numerous authorities there cited. All these authorities give to the courts having jurisdiction the right by habeas corpus to inquiry whether the court restraining the party of his liberty has jurisdiction to do so. The court in its inquiry to ascertain the existence of jurisdiction will look into so much of the proceeding as will enable it to determine whether

jurisdiction exists or not. (*Ex parte* Lange, 18 Wall., 163; *Ex parte* Parks, 93 U. S., 18.)

It was claimed in argument that each court is the judge of its own jurisdiction. That is true to a certain extent. But it can not so adjudge its jurisdiction as to deprive a person of the right by habeas corpus to ask a court having jurisdiction to issue the writ to make inquiry to see if there has been a rightful exercise of jurisdiction.

This is sufficient on the motion to dismiss the proceedings in these cases for want of jurisdiction in this court to issue the writ.

The cases of James Farley and Robert Wilson, who petitioned for a writ of habeas corpus, are exactly alike as far as the question of jurisdiction is concerned. They were charged by an indictment found by a grand jury impaneled by the court at Muskogee with the crime of larceny.

Jurisdiction in a court to try a case means jurisdiction over the place, the person, and the subject-matter. That there may be a subject-matter there must be an act that is a crime, and this act must be properly and legally presented before a court. These petitioners were tried and convicted upon an indictment, and sentenced to jail upon that conviction, where they now are.

As far as these two cases are concerned, it will be sufficient to inquire whether the indictment against them was legally found, as they were charged in no other way than by indictment.

The first question is, was the indictment in the case of Wilson and Farley legally found, that is, was the grand jury that found it a legal body? Has the court at Muskogee the power to impanel a grand jury? If it has not such power, the grand jury that found this indictment was an illegal body, and it had no power to accuse any one by indictment.

All courts of the United States, whether they be the Supreme Court of the United States, circuit courts, district courts, United States Territorial courts in the Territories, or the court for the Indian Territory, estab-

lished by the act of March 1, 1889, are creatures of the Constitution and the statutes passed in pursuance thereof, and they have only such fundamental powers as are conferred by the Constitution or by statute.

Has the court at Muskogee the power to impanel a grand jury? If it has not this power there was no subject-matter properly presented in the case of Farley and Wilson upon which the court could proceed to try them. It must get this power from the statutes of the United States. It has no such inherent power, because it is a court created by a statute of the United States.

All of its powers, as fundamental as that of impaneling a grand jury, must be found in the statute law of the United States, or they do not exist.

Then this right of the court at Muskogee to impanel a grand jury must be found either in the act of Congress of March 1, 1889, creating the court, or it must come from the general statutes of the United States.

The reading of the act creating the court shows an entire absence of any provision for a grand jury.

This was no mere oversight in Congress, as Mr. Culberson, chairman of the Judiciary Committee of the House of Representatives, when, on February 28, 1889, presenting the final conference report of the two Houses to the House of Representatives on the subject of the bill providing for a grand jury, said, "as the court is limited in its criminal jurisdiction to offenses below the grade of felony, no grand juries will be needed and none are provided for." This is the language of one of the law-makers. The language of the gentleman, who, as chairman of the Judiciary Committee of the House, had charge of the bill in that branch of the law-making power.

The statements of those who made the law, made to the legislative body passing it, as to its meaning and purpose are always competent.

This statement as to the power conferred is fully borne out by the act itself. Unless there is in this act express provision for a grand jury, the court does not have by virtue of it the power to impanel one.

There is no express power of this kind in the law creating the court.

Does the court have that power by the general law of the United States?

The only general law upon the subject of grand juries is found in sections 808 and 810 of the general statutes of the United States. Section 808 provides that "every grand jury impaneled before any district or circuit court shall consist of not less than sixteen nor more than twenty-three persons." The remainder of the section provides a method for filling up the panel when a sufficient number do not attend or where a challenge is sustained to the panel.

Section 810 provides when a grand jury shall be summoned to attend any circuit or district court, that it is to be done when ordered by one of the judges of the circuit court, or the judge of such district court. These two sections are the only two in the general statutes which provide for a grand jury. It will be observed that the language of section 808 provides for impaneling a grand jury before a district or circuit court; and section 810 confines the summoning of a grand jury to a circuit or district court. These words, circuit and district, as words of description, certainly have a meaning, and as such words they become words of limitation used to limit the character of the courts in which grand juries may be impaneled to the courts established by the laws of the United States, and by such laws named as circuit and district courts.

The Supreme Court of the United States in *Reynolds* v. *The United States* (98 U. S., 145) says:

> Sec. 808 was not designed to regulate the impaneling of grand juries in all courts where offenders against the laws of the United States could be tried, but only in the circuit and district courts.

This is an interpretation by the highest tribunal of the land of the meaning of the section which really needed no interpretation, as its meaning is manifest from its language.

Then, unless the court at Muskogee is a circuit or dis-

trict court of the United States it does not have the power under the general statutes to impanel a grand jury.

It is hardly necessary to add that it is neither. It is a court of the United States, but is not a district or circuit court.

The tenure of the office of its judge shows that, as he holds his office but for four years, while the tenure of the circuit or district judge is, as provided by the Constitution, during good behavior; that the court is not a circuit or district court. The nature of its civil jurisdiction, as conferred by the act of March 1, 1889, also shows its character to be other than that of a circuit or district court, for civil jurisdiction is conferred by that act upon this court that Congress, under the Constitution, can not confer on a circuit or district court of the United States.

Then the Muskogee court does not have the right to impanel a grand jury as an inherent right by virtue of its being a court. It does not get it from the law of its creation. It does not get it from the general statutes. Consequently it has no such right. Not having such right the grand jury impaneled by it was an illegal body, and its charging persons with crime by indictment or information would be simply a nullity.

A person convicted and sentenced to imprisonment upon such an indictment would be illegally convicted and illegally restrained of his liberty, and consequently would be held in custody or deprived of his liberty contrary to the Constitution and laws of the United States. He would be restrained of his liberty without due process of law. When the fifth article of the amendment to the Constitution provided "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury," it meant a grand jury which was a legal body, one impaneled by a court which had legal authority to so impanel it. When it appears to a court having jurisdiction to issue the writ of habeas corpus that a petitioner for the same is restrained of his liberty contrary

to the Constitution and laws of the United States, the writ becomes one of right belonging to the citizen and a court has no right to refuse it to him. The court can exercise no discretion against issuing it, but it must go as a matter of right.

To my mind the above views are decisive of the cases of Farley and Wilson. That they are held in custody without due process of law there can be no question, and consequently they are restrained of their liberty contrary to the Constitution and laws of the United States, and therefore the writ of habeas corpus has become a writ of right, and the writ to bring them before the circuit court of this district must be issued, and it is so ordered.

Ex Parte Benjamin Brown.

PETITION FOR HABEAS CORPUS.

The petition states that on the 15th day of June, 1889, an information was filed against him by the United States attorney for the Indian Territory in the United States court for said Territory, charging him with assault on one R. H. Boustead, who is alleged in said information to be a United States citizen, by shooting at the said Boustead. That on the 11th day of September, 1889, he was tried upon said charge and found guilty by the jury. That afterwards judgment was pronounced by the court upon said verdict, by which petitioner was sentenced to imprisonment in the jail at Muskogee for one year, and a fine of $100. That afterward he filed a motion for a new trial and in arrest of judgment, alleging said court had no jurisdiction of said case, both of which were overruled

That the information by which petitioner was charged with the offense set out the offense known to the law as an assault with intent to kill. That said United States court for the Indian country had no jurisdiction to try the petitioner for such an offense. For this rea-

son the petitioner is restrained of his liberty contrary to the law and the Constitution of the United States, and therefore entitled to his discharge from arrest.

M. M. Edmiston, Thomas Marcum, and Wm. H. H. Clayton, United States attorney, for petitioner; Z. T. Walrond, United States attorney for the Indian country, for respondants.

The question of the jurisdiction of this court to issue the writ of habeas corpus in such a case as the one set out in the petition was passed upon in the case of *ex parte* Farley and *ex parte* Wilson before the court at this term. Upon the principle there recognized the plea to the jurisdiction of this court to issue the writ of habeas corpus will be overruled.

The question raised in this case is whether the United States court for the Indian country had jurisdiction to try, convict, and sentence the petitioner to jail for one year or any other time.

The charging part of the information upon which petitioner was convicted, a copy of which information is attached to the petition, sets out that—

> Petitioner on or about the 1st day of June, 1889, within the Indian country at a place under the exclusive and sole jurisdiction of the United States, unlawfully did then and there assault the person of one R. H. Boustead, a citizen of the United States, * * * with force and arms, with a revolving pistol, a deadly weapon, commonly called a revolver, loaded or charged with cartridges containing gunpowder and leaden balls and of the caliber of No. 45, in the defendant's hand, then and there held and discharged divers times at and against the said complainant * * * with intent to do him, the complainant, * * * bodily injury, without provocation and in an abandoned manner, etc.

The statement of Mr. Walrond, the United States district attorney, made in his argument before this court in this case was that the proof offered by the Government showed that petitioner presented his pistol in the direction of Boustead, and while holding it in such direction, within shooting distance of Boustead, across the street from him, fired at Boustead. These facts show a case as set out by the allegations of the information descriptive of the assault, but not such a case as the

conclusion of the information would indicate, but an assault with intent to kill.

Was this case such a one that the court which tried the case had jurisdiction to try?

Section 4142 of the general statutes is that—

> Every white person who shall make an assault upon an Indian or other person, and every Indian who shall make an assault upon a white person within the Indian country, with a gun, rifle, sword, pistol, knife, or any other deadly weapon, with intent to kill or maim the person so assaulted, shall be punished by imprisonment at hard labor for not more than five years nor less than one year.

The offense as presented by this section is made up of two things, act and intent. That the act may be shown to exist, it must be proven that the force and violence used was of the character, as used, to endanger life, the overt act of violence must be such as to jeopardize life or put the body in danger of receiving such great violence that death might ensue from such violence. Whenever an act of this kind is done the law attaches a certain intent to such an act, and it does not permit a party to deny that he intended the consequences which usually, naturally, and reasonably follow from acts of like character. Nor does the law permit a pleader when he sets out acts which make in the law an assault with intent to kill, to attribute any other intent to the party who did the act than the intent which the law attributes to such an act.

As the law can not look into a man's mind to find out his intent, it is forced to judge of his intention from his acts. Acting on this principle the presumption of law is that a man is held to have intended the natural and ordinary consequences of his acts.

Chief-Justice Shaw, in *Commonwealth* v. *York* (9 Metc., 103), said:

> A sane man, a voluntary agent acting upon motives, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts. If, therefore, one voluntarily or willfully does an act which has a tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended so to destroy such person's

> life. So if the direct tendency of the willful act is to do another some great bodily harm, and the death in fact follows as a natural and probable consequence of the act, it is presumed that he intended such consequence and he must stand legally responsible for it. So when a dangerous and deadly weapon is used with violence upon the person of another, as this has a tendency to destroy life or do some great bodily harm to the person assailed, the intention to take life or do him some great bodily harm *is a necessary conclusion from the act.*

Mr. Justice Field, in *United States* v. *Outerbridge* (5 Sawyer, 620), said:

> The usual effect of a leaden ball fired from a loaded pistol of the common size at a distance of a few feet only, striking the head or back of a person is to kill such person; the law therefore presumes that any one who fires a loaded pistol within a few feet of the object intends to kill; it therefore implies malice in him.

If the act as charged and proven to have been done by petitioner had resulted in striking and killing Bousted, the crime would have been murder.

Then, as a matter of course, under the section of the statute above set out it would be an assault with intent to kill, as that section to make an assault with intent to kill does not require it to be murder if death had ensued, for if in such case it would be manslaughter, the same act, if death did not ensue, would be an assault with intent to kill. Under the principles set out above as having been enunciated by eminent jurists, and in fact under every principle of the law relating to the method of finding intent, the act of petitioner, as charged by the information and as stated by Mr. Walrond to have been proven, can be nothing else than an assault with intent to kill, as it is defined by section 2143 of the Revised Statutes. By the law as declared in *ex parte* Wilson (114 U. S., 426) and *Mackin* v. *United States* (177, 352) the offense is an infamous offense, and under article 5 of the amendment of the Constitution an not be punishable except the party is charged by an indictment or information of a grand jury.

The United States court for the Indian country has no jurisdiction of an assault with intent to kill.

Section 25 of the act of Congress of March 1, 1880, is:

> That if any person in the Indian country assault another with a deadly weapon, instrument or other thing with an intent to inflict upon the person of another a bodily injury when no considerable provocation appears, or when the circumstances of the assault show an abandoned and malignant disposition, he shall be adjudged guilty of a misdemeanor and on conviction shall be fined in any sum not less than fifty nor exceeding one thousand dollars, and imprisonment not exceeding one year.

The offense defined in this law is declared by it to be a misdemeanor. The one defined as an assault with intent to kill is an infamous offense, and a party can only be tried for it after an indictment found by a grand jury.

The petitioner was tried for an assault with intent to kill upon an information. This can not be done. But it is claimed that the court for the Indian country, although it does not have jurisdiction of an assault with intent to kill, may take an act that is an offense of this character and carve out of it the offense prescribed by section 25 of the act of March 1, 1889, and proceed to try, convict, and punish the party for an offense thus found to exist.

Can this be done?

What is the real crime that existed and of which the showing made by the Government makes the petitioner guilty? Assault with intent to kill.

Then in legal parlance he is guilty of no other crime.

There was no crime such as is prescribed in the twenty-fifth section of the act of March 1, 1889, which as an offense had an independent existence. The lesser crime in such a case is merged in the higher one. When the proof shows a felony, by the law based on public policy the misdemeanor disappears.

When a court does not have jurisdiction to try the infamous offense, the law, founded upon public policy, as well as upon good faith to the party tried, demands that the party shall not be tried for the misdemeanor by such court, as by this method of proceeding, if it were the law, a person might escape punishment for a

high offense by going before a court that had the right to try misdemeanors alone, and pleading guilty and receiving an inadequate punishment. But as this can not be done, it is a great injustice to a party that he should be tried and convicted twice for the same act. The verdict of the jury and judgment of the court in this case is no protection to the petitioner for the reason that the offense of which he was tried was a misdemeanor, as it is the rule of the law that a trial and conviction, or acquittal, of a misdemeanor is no bar to another indictment for a felony. (*People* v. *Sanders* 4th, Parker's Crim. Cases, p. 93; *Dinkey* v. *Commonwealth*, 55 Am. Rep., 542; 17 Penn. State Rep., 126.)

To make a trial and conviction or acquittal of a person for an offense a bar to another trial for the same act, the accusation, whether made by indictment or information, must be such as that the person might have been found guilty and sentenced on it for the act of which he is accused a second time, and for which he is put on trial a second time.

If in the trial of this case the petitioner could not have been found guilty of an assault with intent to kill, because the court had no jurisdiction to try such an offense, then he can not set up his trial and conviction before that court as a bar to a trial and conviction before the court having jurisdiction to try him for such act upon a charge of assault with intent to kill. (*Dinkey* v. *Commonwealth*, *supra*; *State* v. *Hattabough*, 66 Ind., 223.)

> If a man has been once fairly tried there ought to be an end of the accusation forever. The right not to put in jeopardy a second time for the same cause is as sacred as the right of trial by jury and is guarded with as much care by the common law and the Constitution.

A trial of a party before a court having no jurisdiction or a trial that is illegal may harass and annoy a person as much as though it was legal. Therefore it is that he must be tried for an act by a court having jurisdiction and in a legal way that he may be protected.

Mr. Wharton, in his Criminal Law, volume 1, section 563, says:

> The true test is, could there have been a conviction of the major offense at the time of the conviction or acquittal of the minor? If so, then such conviction or acquittal of minor is a bar. The reason is, that by convicting or acquitting of the minor on a count in which the major is contained, the defendant is virtually acquitted of the major.

In this case the offense of which petitioner was convicted is the minor one, and that of assault with intent to kill is the major one. The court at Muscogee had no jurisdiction of the major offense; therefore the petitioner, by his conviction and sentence there, is not protected against another trial upon the same facts for an assault with intent to kill by a court having jurisdiction of such offense. When such a state of case exists, a court can not carve out of the higher offense, of which it has no jurisdiction, one of less grade and try the party for it, as this is unjust to the public, and it may be unjust to a party charged, and therefore it is against the policy and humanity of the law. To authorize it to do so it must have jurisdiction of both offenses, and at the trial where the party is found guilty of the one of less grade the charge must be so made as upon that indictment the party might be found guilty of the major offense.

The misdemeanor in this case is clearly merged in the felony, and the court must always try for the crime committed.

In *Wright* v. *State* (5 Ind. 527), the court said assault and battery, which is simply a misdemeanor, is not included in any of the degrees of homicide. The misdemeanor is merged in the felony. The merger of the misdemeanor in the felony is as complete in the case of an assault and battery with intent to commit murder as where the murder is committed.

In second Russell on Crimes, 9th Ed. p. 1026, occurs this paragraph:

> Thus, where the defendant was indicted for a misdemeanor, in burning a house in his own occupation, such house being alleged to be contiguous and adjoining a certain dwelling-

house of divers liege subjects, etc.; and the facts of the case as found by the counsel for the prosecution appeared to be that the defendant set fire to his own house in order to defraud an insurance office, and that in consequence several houses of other persons adjoining his own were burnt down. Ballard, J., said that if other persons' houses were in fact burnt, although the defendant might only have set fire to his own, yet under these circumstances the prisoner was guilty, if at all, of felony, the misdemeanor being merged and could not be considered in this indictment; and he therefore directed an acquittal.

If the court at Muscogee can carve a lesser offense out of a higher one of which it has no jurisdiction, justice might be defeated, because if, out of every assault with intent to kill, there might be carved an aggravated assault, and in this way, out of an infamous offense, a felony, a misdemeanor may be made, and it might be inadequate punishment administered.

As I have said, this policy would be against public justice. If the court at Muscogee had jurisdiction of an assault with intent to kill and the petitioner had been indicted for that offense and convicted of an aggravated assault, he could not complain, as such a proceeding would protect him against any further trial; but as the court at Muscogee has no jurisdiction of assaults with intent to kill, it can not put a person on trial for that offense, nor can it ignore the higher offenses for the purpose of taking jurisdiction of the lesser one.

Congress intended that the Muscogee court should try parties only for the lesser offense. In this case the information shows that the offense is one of which the Muscogee court has no jurisdiction. The allegations of the information in this case determine the jurisdiction.

I am clear that upon the statement in the information, and the facts as stated by Mr. Walrond, the offense is that of an assault with intent to kill.

It is said that perhaps the petitioner shot at the legs of Boustead, and that hence it was only an aggravated assault. Might not death ensue from such an assault? And if so, is it not an assault with intent to kill? It is so because the intent and purpose of the prisoner was

to inflict such a wound as that death might follow from it, and when he did a wicked and wanton act like this neither he nor the prosecuting attorney has any right to carve out for him a lesser crime because perchance the assailed might not have died. It is enough to know that death might have followed. Is not the main artery of a man's leg almost as vital as the heart itself? It was not claimed for the prisoner that he only intended a flesh wound or that he aimed at any particular part of the legs. If he shot at Bousted's legs in a reckless manner, is he then entitled to such an interpretation of his wicked conduct as that he only intended to wound Bousted as to cause great suffering or little suffering, but not to such an extent as to endanger life? How are we to distinguish in such a case between what might have been great bodily harm and a slight injury? If he actually shot at Bousted with a 45-caliber pistol without cause or excuse, then is he not held to have intended such results as might probably have ensued from the act?

There can be no difference between an intent coupled with an act to inflict such a wound as would probably result in long suffering and final death, and an intention to shoot a man through the heart coupled with the act of firing. In such a case if carving out a less offense is to be done what line are we to carve to? Where shall we begin and where shall we end? Upon what principles or by what authority can it be said that because a man shoots at another man's legs he only intended to inflict a slight wound? The intent was clearly to wound. Could a man know beforehand what sort of wound he was going to inflict? The prisoner is presumed to know the nature of the weapon used as well as the dangerous consequences of the use.

I am satisfied that the court at Muskogee had no jurisdiction to try the petitioner of the offense that he is really guilty of, and he is therefore entitled to a discharge from arrest. I desire to say in regard to all these cases which have been before me on habeas corpus, that I think the Government has made a mistake. By this mistake these petitioners have been wrongfully

deprived of their liberty. They have been harrassed by a trial. They have been put to the expense of employing counsel. They have been cast into prison, and while their trials and convictions before the court at Muskogee can not be pleaded in bar by them, I think when the grade of offenses are no higher than these they have committed the humanities of the law would be subserved by discharging all of them from arrest, and that the Government because of its mistakes proceed no further.

The writ is ordered to issue in this case.

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135-271

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 224.—THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

JOHN D. SANBORN.

No. 225.—JOHN D. SANBORN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 19, 1889.

SUPREME COURT OF THE UNITED STATES.

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No. 224.—THE UNITED STATES, PLAINTIFF IN ERROR,

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No. 225.—JOHN D. SANBORN, PLAINTIFF IN ERROR,

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between The United States of America, plaintiffs, and John D. Sanborn, of Rockport, in the district of Massachusetts, defendant, in an action of contract, a manifest error hath happened, to the great damage of the said defendant as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done herein to correct that error what of right and according to the laws and custom of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the ninth day of October, in the year of our Lord one thousand eight hundred and eighty-six.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by:

LEBARON B. COLT,
U. S. Circuit Judge, First Judicial Circuit.

1*a* CIRCUIT COURT OF THE UNITED STATES,
District of Massachusetts, ss:

And now, here, the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this ninth day of October, A. D. 1886.

[SEAL.] JOHN G. STETSON,
Clerk.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between the United States of America, plaintiffs, and John D. Sanborn, of Rockport, in the district of Massachusetts, defendant, in an action of contract, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done herein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the ninth day of October, in the year of our Lord one thousand eight hundred and eighty-six.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by:

LEBARON B. COLT,
U. S. Circuit Judge, First Judicial Circuit.

2*a* CIRCUIT COURT OF THE UNITED STATES,
District of Massachusetts, ss:

And now, here, the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this ninth day of October, A. D. 1886.

[SEAL.] JOHN G. STETSON,
Clerk.

3 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the District of Massachusetts, on Satur-

day, the fifteenth day of May, in the year of our Lord one thousand eight hundred and eighty-six.

Before the Honorable LeBaron B. Colt, circuit judge.

In an action of contract.

UNITED STATES OF AMERICA, PLAINTIFFS,
v.
JOHN D. SANBORN, OF ROCKPORT, IN THE DISTRICT of Massachusetts, defendant. } No. 2188.

Declaration.—Filed Oct. 15, 1883.

And the plaintiffs say that the defendant is indebted to them in a large sum of money, to wit: Seven thousand three hundred and thirty-four dollars ($7,334.00), for money received by the defendant of and from the plaintiffs without authority of law or right thereto, and interest on said sum from August 16th, 1873.

4 To the damage of the said United States, as they say, the sum of ten thousand dollars.

The writ in this cause is dated the twenty-third day of June, A. D. 1883, and was duly entered at the October term of this court, A. D. 1883, when and where the parties appeared by their respective attorneys.

On the third day of May, A. D. 1884, the following answer was filed:

Defendant's answer.—Filed May 3, 1884.

And now comes the defendant and for answer to plaintiff's process denies each and every allegation and averment in the plaintiffs' writ and declaration contained.

And further answering he says that the cause of action mentioned in the plaintiffs' writ did not accrue within six years before the suing out of the plaintiffs' writ; also that in said suit certain parties are seeking alleged private rights in the name of the United States of America.

By his attorney,

FRANK L. WASHBURN.

This cause was thence continued from term to term to this present October term, A. D. 1885, when, on the twenty-seventh day of November, the following agreement is filed:

Waiver of jury trial.—Filed Nov. 27, 1885.

In the above entitled case it is agreed that trial by jury be,
5 and it hereby is, waived, and that the case be tried before the court without the intervention of a jury, according to the provisions of sections 649 and 700 of the Revised Statutes of the United States.

GEORGE P. SANGER,
U. S. Attorney, Attorney for Plaintiffs.
FRANK L. WASHBURN,
Attorney for Defendant.

Issue having been joined, the cause came on to be heard before the court, the Honorable George M. Carpenter, district judge of the United States for the district of Rhode Island, duly assigned by the Honorable LeBaron B. Coit, circuit judge, to hold said circuit court, sitting, and was fully heard upon argument of counsel for the respective parties.

Thereupon, on the twenty-sixth day of February, A. D. 1886, the court made their findings of facts and law in this cause and the same were filed accordingly, as follows:

Findings of fact and law.—Filed Feb. 26, 1886.

This cause was tried by the court without a jury, and the parties were heard and their allegations and evidence have been considered, and the court now makes the following findings:

The court finds as matter of fact as follows; that is to say:

On or about the 15th day of July, 1872, the defendant sent the following letter to the Secretary of the Treasury, which letter had been verified by oath, as appears by the copy thereof:

BOSTON, *July* 15, 1872.

SIR: I beg leave to submit the following statement under the act
5a making appropriations for the year ending June 30, 1873, regarding the discovery and collection of money belonging to the United States withheld by any person or corporation, and to ask to be employed under the provisions of the clause to which reference is made. I desire to set forth fully a written statement under oath as follows:

First. Claims out of which I propose to recover, or assist in recovering, money of the United States for evasions of the laws and frauds upon the laws for the collection of internal-revenue tax upon spirituous and fermented liquors, as well in making false returns of the amounts manufactured as in evading the payment of the tax upon them which is returned; and I append hereto a schedule of the names of the persons and firms which have thus withheld such moneys, and the probable amount thereof.

I also beg leave to state that there are many other firms and owners of distilleries whom I can not more fully specify because I am in process of investigation, and will file with the honorable Secretary an amended schedule as fast as I find the names of such firms.

I ask to be allowed such amount from the collections, in the form of a percentage, as in the judgment of the Secretary of the Treasury in the matter is meet and fit.

I have the honor to be, very respectfully,

JOHN D. SANBORN.

Hon. GEORGE S. BOUTWELL,
Secretary of the Treasury.

6 DISTRICT OF COLUMBIA,
County of Washington:

Sworn and subscribed before me this 13th day of August, A. D. 1872.
[SEAL.] A. B. JOHNSON,
Justice of the Peace.

On the 13th day of August, 1872, a contract in writing was made between William A. Richardson, Acting Secretary of the Treasury, and the defendant, which contract was in the following words:

An agreement made this 13th day of August, A. D. 1872, by and between William A. Richardson, Acting Secretary of the Treasury, party of the first part, and John D. Sanborn, of the city of Boston, Massachusetts, party of the second part.

The said party of the second part having been designated by the Secretary of the Treasury as one of three persons to assist the proper officers of the Government in discovering and collecting moneys belonging to the United States withheld by certain persons, under one of the provisions of the legislative, executive, and judicial appropriation bill approved May 8, 1872, and the said party of the second part having fully set forth, as therein required, in a written statement under oath, addressed to the Secretary of the Treasury and filed in his office, that he proposes to recover, or assist in recovering, for the United States, from the following persons, to wit: (Here follows list of names) a large sum of money, to wit, five hundred thousand dollars, which the said party of the second part claims to be due to the United States for internal-revenue taxes upon spir-
6a ituous and fermented liquors, as well as in making false returns of the amounts manufactured as in evading the payment of the tax upon them which is returned, which were legally due under the several acts of Congress levying internal-revenue taxes, and which have been withheld by the said persons.

Now it is agreed by and between the said parties:

First. That the said party of the second part may proceed to collect the said taxes so alleged to be due to the United States by the said persons.

Second. That in case any legal proceedings are required to be had in the premises, the same shall be conducted by the proper United States attorneys, but no such proceedings shall be taken without the written consent of the Secretary of the Treasury first being obtained.

Third. No settlement of such claims shall be made except under the provisions of section 10 of the act of March 3, 1863.

Fourth. All the costs and expenses which shall be incurred by the party of the second part in investigating and prosecuting the said claims, of every name or nature, shall be paid and borne by said party of the second part, and no part of the same shall be paid out of that portion of whatever shall be realized from said claims under this agreement which is to be retained by the United States.

Fifth. The said party of the second part shall, whenever required by the Secretary of the Treasury, make a full report in writing of all his acts and proceedings under this contract.

Sixth. Whenever any money shall be collected from said persons upon said claims, either by legal proceedings or by settlement as
7 compromise of said claims, such money shall be paid by said persons to the credit of the Secretary of the Treasury, and out of any money so collected and received there shall be paid to said party of the second part, in full for his services and for all the costs and expenses of such collection, a sum equal to 50 per cent. of the gross sum so collected and received, which said 50 per cent. shall be paid to the party of the second part as fast as the money is collected and paid to the credit of the

Secretary of the Treasury. The balance of said money to be paid into the Treasury of the United States.

Seventh. This contract may be revoked at any time at the pleasure of the Secretary of the Treasury.

In witness whereof the said parties have hereunto set their hands and seals the day and year above written.

[SEAL.] WILLIAM A. RICHARDSON,
Acting Secretary of the Treasury.
JOHN D. SANBORN. [SEAL.]

Witness to both signatures:
E. C. BANFIELD.

On the 25th day of October, 1872, the defendant sent to the Secretary of the Treasury a statement of which the following is a copy, which statement was verified by oath, as appears by the copy thereof:

BOSTON, *October* 25, 1872.

SIR: I beg leave to submit the following statement under the act making appropriations for the year ending June 30, 1873, regarding the discovering and collection of money belonging to the United States withheld by any person or corporation, and to ask that my employment by the Secretary of the Treasury, under the provisions of the clause to
8 which reference is made, may be extended and made to relate to claims against the persons, and whose names are set forth in the following schedule hereunto annexed, for moneys illegally withheld by them from the Government.

I desire also to state that the foregoing claims, out of which I propose to recover or assist in recovering moneys for the United States, arise under the taxes imposed upon legacies and successions and income under the act of July 30, 1864, and subsequent amendatory acts, providing for the collection of taxes for internal revenue.

And I further request that the foregoing cases may be brought under my contract with the Secretary of the Treasury bearing date August 13, 1872.

I am, very respectfully,

JOHN D. SANBORN.

Hon. GEORGE S. BOUTWELL,
Secretary of the Treasury.

District Waldenham * * * James A. Burtis * * * * * John E. Wool.

JOHN D. SANBORN.

Personally appeared before me the above-named John D. Sanborn, at Washington, D. C., on the 18 day of November, A. D. 1872, and made oath that the foregoing statement by him subscribed is true to the best of his knowledge and belief.

A. B. JOHNSON,
Justice of the Peace.

On the 30th day of October, 1872, the Acting Secretary of the Treasury entered into a contract, the material parts of which contract are as follows:

9 Whereas John D. Sanborn, of the city of Boston, has fully set forth, in a written statement signed by him, under oath, and has filed the same in the office of the Secretary of the Treasury, wherein he proposes to recover, or assist the proper officers of the Government in recovering, for the United States from the following persons, to wit: * * * Jno. E. Wool estate, * * * * large sum of money, that is to say, the sum of about fifty thousand dollars, which the said Sanborn claims to be due to the United States, as and for internal-revenue taxes which have been withheld by said persons, under and by force of the act of June 30, 1864, and other acts amendatory thereof, imposing taxes upon legacies, successions, and incomes; it is hereby agreed by and between W. A. Richardson, Acting Secretary of the Treasury, of the first part, and the said John D. Sanborn, of the second part, that the contract or agreement entered into by and between the said parties, bearing date August 13, 1872, relating to the proposed recovery of certain moneys alleged to be due to the United States, is hereby extended and enlarged so as to embrace and relate to the persons herein specifically enumerated; and all the provisions, conditions, and terms of the said contract of August 13, 1872, shall be held to apply to and control this agreement.

In witness whereof the said parties have hereunto set their hands and seals this 30th day of October, A. D. 1872.

WILLIAM A. RICHARDSON,
Acting Secretary.
JOHN D. SANBORN. [SEAL.]

Signed and sealed in the presence of
WM. H. STINER, as to John D. Sanborn.

10 STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

On this thirtieth day of October, in the year of our Lord one thousand eight hundred and seventy-two, before me personally appeared John D. Sanborn, to me personally known, and known to me to be one of the individuals described in and who executed the within instrument, and he acknowledged that he executed the same for the uses and purposes therein mentioned.

[SEAL.]
RICHARD C. GREEN,
Notary Public, New York County.

On the third day of February, 1873, the Secretary of the Treasury signed and issued a paper, of which the following is a copy:

TREASURY DEPARTMENT,
February 3, 1873.

SIR: You are requested to assist John D. Sanborn, esq., of Boston, in the examination of official records in reference to such cases of alleged violation of the internal revenue laws as he may ask for your co-operation.

Mr. Sanborn is acting under an appointment from me and may need some information from the offices of collection and assessors for the purpose of verifying his claims.

Very respectfully,

GEORGE S. BOUTWELL,
Secretary of the Treasury.

To supervisors and collectors of internal revenue.

11 On the fifteenth day of October, 1873, the Secretary of the Treasury signed and issued a paper of which the following is a copy:

TREASURY DEPARTMENT,
October 15th, 1873.

To supervisors and collectors of internal revenue:

You are requested to assist John D. Sanborn, of Boston, in the examination of such cases of alleged violations of the internal revenue laws as he may ask for your co-operation.

Mr. Sanborn is acting under an appointment from the Treasury Department and may need some aid and information from your district for the purpose of verifying his claims.

Please render him such assistance as he requires.

Very respectfully,

WM. A. RICHARDSON,
Secretary of the Treasury.

John E. Wool died at Troy, in the State of New York, on the 10th day of November, 1869, leaving a large estate and leaving Sarah N. Wool, his widow, surviving him. On the 8th day of February, 1870, his will was proved by the surrogate of Reusselaer County, and on the 4th day of March, 1870, letters testamentary were issued by said surrogate to John A. Griswold and Asher R. Morgan as executors of said will. On the 31st day of October, 1872, John A. Griswold died and said Morgan has since been the sole executor of the will. On the 7th day of May, 1873, Sarah N. Wool died.

The following is a copy of the will and codicils thereto of John E. Wool as the same were proved:

12 *The last will and testament of Major-General John E. Wool, of the United States Army.*

I, John E. Wool, major-general in the United States Army, of the city of Troy, State of New York, do hereby make this my last will and testament, and by which I hereby revoke all other wills which I may have at any time previously made.

After paying my funeral expenses and my lawful debts, I make and declare the following bequests:

I bequeath to my beloved wife, Sarah N. Wool, in addition to what I have already given her, which is five thousand dollars, secured to her by mortgage by Helen M. Hicks and husband, twenty thousand dollars, to have and hold the same in her own right and to dispose of the same as she may deem proper.

I also bequeath to my beloved wife, Sarah N. Wool, during her nat-

ural life, but no longer, ten thousand dollars annually to be paid to her quarter yearly, or oftener, if she should require it.

I also bequeath to my beloved wife, Sarah N. Wool, during her natural life, but no longer, the use of my homestead or dwelling-house standing on the corner of First and Ferry streets, including lots number fifty-three and fifty-four as numbered in deed of conveyance, extending one hundred feet on First street and one hundred and thirty feet on Ferry street to an alley, with garden-houses and outhouses, and rents accruing therefrom, with all the tools and implements on the premises. Also, during her natural life the use of all my furniture, bedding, linen, and other household goods, including china, glass, and plate, whether of gold or silver,
13 together with my books, including portraits and pictures contained in my library or elsewhere. Also, the use of my wines, liquors, fuel, and other consumable stores of provisions of which I may be possessed at the time of my decease. I also bequeath to my beloved wife, Sarah N. Wool, absolutely, and to dispose of the same as she may deem proper, my horses, carriages, and harness, and implements for cleaning the same, together with the blankets, halters, saddles, and bridles, excepting my military saddle, bridle, housing holsters, and two pistols, revolvers, which I bequeath to Chester Griswold, of Troy, N. Y., Mrs. Wool's grand-nephew.

I also bequeath to my beloved wife, Sarah N. Wool, absolutely, to be disposed of she may deem proper, all my wearing apparel. The foregoing bequests to my beloved wife, Sarah N. Wool, are hereby declared to be in lieu and satisfaction of all claim or right of dower or otherwise in my estate.

I bequeath to my niece, Eliza Morgan, the daughter of my sister, Mary McCready, deceased, twenty thousand dollars, to be paid to her within one year after the decease of my wife, Sarah N. Wool, provided she may be living; if not, I bequeath it in trust to her son, Asher Riley Morgan, of the city of New York, to be distributed in equal parts to as many as may be living, whether one or more in number, of the children of her three sons, viz: John Wool Morgan, deceased; Captain James McCready Morgan, who died while serving his country in the Army of the United States; and Asher Riley Morgan, the trustee and one of the executors of this will, hereafter to be named. If there should be no children or child living of the three sons, I bequeath the amount, twenty thousand dollars, to Asher Riley Morgan, the trustee.

14 I also bequeath, in addition, in trust to Asher Riley Morgan for the children of the three sons of my niece, Eliza Morgan, if any should be living, whether one or more, thirty thousand dollars, to be distributed in equal parts in such sums and at such times as the trustee shall deem advisable for their interest and benefit. If only one should be living, the bequest will be given to that one at the discretion of the trustee, as above directed. If more should be living, I bequeath it to my two nieces in equal parts, Caroline and Ann, daughters of my sister, Martha Riley.

I also bequeath to Asher Riley Morgan, the son of my niece, Eliza Morgan, fifty thousand dollars.

I also bequeath to his daughter, Sarah Wool Morgan, provided she is living, five thousand dollars. If she should not be living, I bequeath it

to her father, Asher Riley Morgan, or his heirs, to be paid as soon as convenient after the decease of my wife, Sarah N. Wool.

I bequeath to my two nieces, the daughters of my sister, Martha Riley, by name Caroline and Ann, each thirty thousand dollars, to be paid to them one year after the decease of my wife, Sarah N. Wool.

I also bequeath in trust to Asher Riley Morgan for the benefit of the widow, if she should be living at the time of my decease, of John Wool Morgan, five thousand dollars, to be paid to her in such sums and at such times as he may deem advisable and proper after the decease of my wife, Sarah N. Wool.

I also bequeath in trust to Asher Riley Morgan for the benefit of my sister, Eliza Tallman, now Eliza Baldwin, if she should be living at the time of my decease, two hundred and fifty dollars per annum dur-
15 ing her natural life, but no longer, payable after the decease of my said wife, Sarah N. Wool.

I also bequeath to her son John E. Tallman, two thousand dollars, to be paid after the decease of Mrs. S. N. Wool.

I bequeath to my cousin Benjamin B. Wool, seven thousand dollars; to my cousin Peter Wool, five thousand dollars; to my cousin John E. Wool, jr., during his natural life, three hundred and fifty dollars per annum, payable quarter-yearly, that is, every three months one quarter of the three hundred and fifty dollars, to be paid after the decease of Mrs. S. N. Wool.

I bequeath to my friend Amos K. Hadley, a distinguished lawyer and formerly speaker of the house of assembly of the New York legislature, and his wife, Mrs. Hadley, each two thousand five hundred dollars, to be paid after the decease of Mrs. S. N. Wool.

I bequeath to the Reverend Doctor Duncan Kennedy and his wife, the daughter of my friend Joshua A. Spencer, a distinguished lawyer, one thousand dollars. I also bequeath to his daughter, Mary Howard, one thousand dollars, all which is given in remembrance of the many friendly and kind acts which passed between myself, Mr. Spencer, and others of his charming family; to be paid after the decease of Mrs. S. N. Wool.

I bequeath to Joseph W. Moulton (the brother of my wife, Sarah N. Wool), or his heirs, seven thousand five hundred dollars; this in consequence of his friendly and kind feelings to myself; and I also bequeath to Sarah Wool Cooper, the niece of my wife, Sarah N. Wool, seven thousand dollars, provided she is living; if not living, I bequeath the
16 amount to her son and daughter, in equal parts, to be paid after the decease of Mrs. S. N. Wool.

I also bequeath to my aide-de-camp during the late rebellion, Brevet Major-General Thomas Jefferson Cram, and his wife, Mrs. Cram, each four thousand dollars should they be living at the demise of my wife Sarah N. Wool; if not living at the time, I bequeath it to their daughter, their first born, provided she is living; if not living, I bequeath the eight thousand dollars to Sarah Wool Morgan, the daughter of the deceased Captain James McCready Morgan. The bequest to General Cram and wife is in remembrance of his distinguished services to his country previous to and during the late rebellion and his friendly devotion to myself.

I also bequeath to my aides-de-camp, Colonel L. G. B. Carmon, Colonel Alexander Hamilton, jr., and Brevet Major-General Richard Arnold,

of the United States Artillery, each five thousand dollars. This in remembrance of their distinguished services rendered their country during the late rebellion and their devotion and great kindness to myself while serving on my staff. Their conduct on all occasions was worthy of all praise. To be paid after the decease of Mrs. S. N. Wool.

I bequeath to William Laurenson, a soldier in the Army of the United States, for faithful services, nine hundred dollars for the benefit of himself and his wife, and one hundred dollars for giving to a son of theirs my name; in all, one thousand dollars.

I also bequeath to Ann Letson, my servant, provided she remain in the service of my wife, Sarah N. Wool, until her decease, fifteen hundred
17 dollars, and to Sarah Jackson, my servant, provided she remains in the service of my wife, Sarah N. Wool, twelve hundred dollars. Also, I bequeath to James H. Davis, my servant, provided he remains in the service of my wife, Sarah N. Wool, until her decease, the occupation of the house he now occupies in Ferry street, on lot No. 24, free of rent during his natural life, he paying all taxes and repairs of the same.

I also bequeath to William T. Jackson, my coachman, provided he remains in the service of my wife, Sarah N. Wool, until her decease, one thousand dollars, to be endorsed on his mortgage which I hold against him.

I bequeath to the Hon. John A. Griswold, a Representative in Congress, five thousand dollars, this in remembrance of family services previous to and during the rebellion.

I also bequeath to his son, John Wool Griswold, five thousand dollars. This is given as a slight token of my appreciation of the friendly feelings which induced his parents to give my name their charming and promising son, to be paid after the decease of my wife, Sarah N. Wool.

I also bequeath to Mrs. Colonel R. C. Hawkins one thousand dollars. This in remembrance of her great kindness in presenting me with a beautiful silver coffee-pot while I was in command of the Eastern Department of Virginia during the late rebellion, headquarters at Fort Monroe.

I give and bequeath to the Reusselaer Polytec'nic Institute of Troy twenty thousand dollars, provided the institute remains in Troy. To the Troy Orphan Asylum three thousand dollars. To the Day
18 Home, situated in Troy, two thousand dollars, and to the Catholic Orphan Asylum, situated in Troy, two thousand dollars, to be paid after the decease of my wife, Sarah N. Wool.

I also bequeath to my executors, to be named hereafter, each five thousand dollars, limiting, however, the bequest to those only who may qualify and discharge the duties required of them in the execution of my will. The five thousand dollars to each executor who may qualify and discharge the duties required will be in full satisfaction for any services rendered, excepting only extraordinary expenses.

I bequeath to my friend Mrs. John A. Griswold my marble figure called Cleopatra. I also bequeath to her son, John Wool Griswold, my namesake, my homestead, including lots numbered fifty-three and fifty-four, and situated on the corner of First and Ferry streets, extending one hundred feet on First street and one hundred and thirty feet on Ferry street, with all the buildings thereon, to have and to hold the same in his own right after the decease of my wife Sarah N. Wool, with all the right and title I may have possessed, provided, but not otherwise, that he takes

possession after the demise of Mrs. Wool and occupies it as a homestead and permanent residence. In such a case, but not otherwise, I bequeath to him my furniture, including my dining set, silver and gold plate, books of every description contained in my library or elsewhere, with all the portraits and pictures, and whatever else may be on the premises at my decease.

If he, John Wool Griswold, should take possession as devised, or should he think proper to substitute another building for his residence on
19 the lots, but not otherwise, I bequeath to him an additional ten thousand dollars for the purpose of adding another building or room either to the one or the other of the buildings designed for his residence on the lots for keeping and preserving my books, portraits of myself and wife, swords and other military articles or implements, or anything else worthy of preservation not otherwise bequeathed.

The several bequests in money to my beloved wife, Sarah N. Wool, will be promptly complied with by my executors, to be named hereafter; that is, the twenty thousand dollars at any time she may desire payment, and arrangements to meet promptly the ten thousand dollars annually, payable quarter-yearly; that is, one-fourth of ten thousand dollars every three months after my decease and until her decease, but no longer.

The bequests following those of my wife, Sarah N. Wool, will in no case be paid or delivered until after her decease, and not until my executors can conveniently pay them, at their discretion, either in money or stocks, bonds, notes, or mortgages, without unnecessary sacrifice and without interest, no matter how long payment may be delayed.

All my personal estate, beyond what may be requisite to meet the payment of the bequest to my wife, Sarah N. Wool, will, as far as practicable, be securely invested on interest, which will be added to that intended for the payment of the bequests authorized by the will.

The residue of my personal estate, if any remains after paying the bequests already authorized by my will, I bequeath to my three
20 nieces and two nephews, or their heirs, in equal proportions, viz: To my niece, Eliza Morgan, the daughter of my sister, Mary McCready; my two nieces, by name Caroline and Ann, the daughters of my sister, Martha Riley, and her two sons; their given names are known to Asher Riley Morgan.

And lastly, I do hereby nominate and appoint Asher Riley Morgan, my grand-nephew, a lawyer, Charles R. Ingalls, one of the justices of the supreme court of the State of New York, and John A. Griswold, the nephew of my wife Sarah N. Wool, a Representative in Congress, executors of this my last will and testament, and by which all other wills by me made are revoked. In witness whereof I have hereunto set my hand and seal, seventeenth day of March, eighteen hundred and sixty-eight.

JOHN E. WOOL. [L. S.]

Subscribed, sealed, and declared by the testator, John E. Wool, to be his last will and testament in the presence of us, who, at his request, in his presence and in the presence of each other, have subscribed our names as witnesses.

JOHN T. LAMPORT, *of the city of Troy, Rensselaer Co., N. Y.*
THOMAS M. TIBBITS, *of the city of Troy, Rens. Co., N. Y.*
WILLIAM A. THOMPSON, *of the city of Troy, Rens. Co., N. Y.*

Codicil.

Whereas, my last will and testament, dated the seventeenth day of March, 1868, I gave to John W. Griswold my real estate situate on the corner of First and Ferry street, in the city of Troy, and a legacy of ten thousand dollars, for the purpose mentioned in said will, I do by this present writing, which I declare to be a codicil to my said will, give and bequeath to said John W. Griswold the further sum of twenty-five
21 thousand dollars in increase of and in addition to said legacy, and I hereby ratify and confirm my aforesaid will in all respects except so far as changed by this codicil. In witness whereof I have hereunto subscribed my name and affixed my seal this second day of November, 1869.

JOHN E. (his x mark) WOOL. [L. S.]

Signed, sealed, published, and declared by the testator to be a codicil to his last will and testament in our presence, who, at the same time, in his presence, at his request and in presence of each other, have subscribed our names as witnesses.

C. L. TRACY, *Troy, N. Y.*
G. F. SIMS, *Troy, N. Y.*

Codicil.

Whereas I, John E. Wool, did this second day of November, 1869, make and execute a codicil to my last will and testament, now I do hereby make a second codicil to said last will and testament (which last will and testament is dated the seventeenth day of March, 1868). I authorize and direct my executors named in my said will to pay to my wife such sum of money as she shall desire up to fifty thousand dollars for the purpose of erecting a monument for her and me.

In witness whereof I have hereunto subscribed my name and affixed my seal this second day of November, 1869.

JOHN (his x mark) WOOL. [L. S.]

Signed, sealed, published, and declared by the testator to be a second codicil to his last will and testament in our presence, who,
22 at the same time, at his request, in his presence and in presence of each other, have subscribed our names as witnesses.

C. L. TRACY, *Troy, N. Y.*
JAMES THORN, *Troy, N. Y.*

Codicil.

I, John E. Wool, do make this third codicil to my last will and testament, which last will and testament and the first and second codicils thereto are hereto annext, and are hereby republished and confirmed.

First. I give and bequeath to the trustees of Williams College, in the State of Massachusetts, the sum of five thousand dollars, an evidence of my application of the compliment conferred on me by that institution.

Second. I give and bequeath to the heirs of Robert Wool the sum of five thousand dollars.

Third. I give and bequeath to Chester Griswold, son of John A. Griswold, ten thousand dollars; and to each of the other children of John A. Griswold, three thousand dollars.

Fourth. I give and bequeath to Mrs. Harriet E. Hart two thousand dollars, an evidence of my regard.

Fifth. I give and bequeath to James A. Hardie and E. D. Townsend, who were formerly of my military family, two thousand dollars each.

Sixth. I give, devise, and bequeath to James Davis, in addition to the provision for him in my will, the house and lot occupied by him in Ferry street, and one thousand dollars.

Seventh. I revoke five thousand dollars of the bequest in my will to the Polytechnic Institute.

23 In witness whereof I have hereunto set my hand and seal this fifth day of November, 1869.

JOHN E. (his x mark) WOOL. [L. S.]

Signed, sealed, published, and declared by the testator to be a third codicil to his last will and testament in presence of us, who, at the same time, in his presence, at his request, and in presence of each other, have subscribed our names as witnesses.

C. L. TRACY, *Troy, N. Y.*
JAMES THORN, *Troy, N. Y.*
C. L. HUBBELL, *Troy, N. Y.*

John T. Masters was collector of internal revenue at Troy, and his district included the city of Troy. He and his deputy knew of the death of John E. Wool at about the time it occurred; they knew that he left a large estate and that he left a will, and knew what were the provisions of his will, and talked together regarding the claim that a legacy tax would be due after the death of Sarah N. Wool, both before and after her death; they knew of the death of Sarah N. Wool at about the time it occurred.

On the 31st day of July, 1873, said Masters sent to said Morgan a letter, of which the following is a copy:

UNITED STATES INTERNAL-REVENUE
COLLECTOR'S OFFICE, 15TH DISTRICT, NEW YORK,
Troy, July 31st, 1873.

SIR: No return has been made to me of the legacies and distributive shares of the estate of the late Gen. John E. Wool, of whose will I am informed you are the only surviving executor who has qualified as such.

24 Enclosed herewith is the "collector's notice for legacy and succession taxes" and the proper form upon which to make a return of all the legacies and distributive shares arising from personal property, etc., being in your charge and trust as executor as aforesaid.

Please make a return to me at your earliest convenience of all such legacies and distributive shares or successions and all other facts and information as required by law to be made by you as executor.

Very respectfully,

JOHN I. MASTERS,
Collector.

ASHER R. MORGAN, Esq.,
Executor, &c., New York.

In this letter were enclosed the papers therein referred to, that is to say, the "collector's notice for legacy and succession taxes" and the proper form upon which to make the return.

Within a few weeks after the death of Sarah N. Wool said Morgan wrote to the Secretary of the Treasury asking him to refer the question of succession and legacy tax on the estate of said John E. Wool to some person in authority to pass upon the liability of said Morgan to pay taxes on said estate and before the 31st day of July, 1873, he received a letter from the Secretary of the Treasury referring all questions relating to said matter to Lucien Hawley, supervisor of internal revenue. Said Morgan subsequently had several consultations with said Hawley relative to said taxes.

On the 12th day of July, 1873, J. W. Douglass, Commissioner
25 of Internal Revenue, addressed a letter to J. T. Masters, esq., collector of internal revenue at Troy, N. Y., of which letter the following is a copy:

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, 12 *July*, 1873.

SIR: T. J. Cram, of 1817 De Lancey Place, Philadelphia, Pennsylvania, writes:

"Maj. Gen. Wool, U. S. A., died Nov. 10, 1869 (in Troy, N. Y., his residence), leaving legacies of $4,000 each to my wife and myself. But there was a condition in the will forbidding his executors from paying any legacies until after the death of his wife. * * * Mrs. Wool died 6 May last.

"The executor proposes to retain from the legacies U. S. tax of 6 per cent. on payment 18th inst. of the legacies, &c.".

There is nothing in the statements above to show that the said legacies are not subject to tax, but the same would appear to be liable, as indicated in "Circular 86." (See p. 30, "Series 6, No. 1.")

Very respectfully,

J. W. DOUGLASS,
Commissioner.

J. T. MASTERS, Esq.,
Collector, Troy, N. Y.

On the first day of August, 1873, said Morgan delivered to Lucien Hawley, supervisor of internal revenue, in payment for the taxes due from the estate of the said Wool, a draft, of which the following is a copy and a copy of the endorsements thereon:

26 [2-cent internal rev. stamp. Cancelled.]

NEW YORK, *Aug't 1st*, 1873.

Pay to William A. Richardson, Sec. of Treasury, or order, fourteen thousand six hundred and sixty-eight dollars.

ASHER R. MORGAN,
Surviving executor of last will, &c., of John E. Wool, dec'd.

United States Trust Company of New York.
$14,668.

(Indorsed as follows:)

TREASURY DEPARTMENT,
August 9, 1873.

Pay to the order of F. E. Spinner, Treasurer of U. S.
WM. A. RICHARDSON,
Secretary.

Pay ass't treasurer U. S. at New York, or order.
L. H. TUTTLE,
Ass't Treas. U. S.
THOS. HILLHOUSE,
Assistant Treas. U. S.

This draft was in due course paid by the United States Trust Company.

Said Morgan wrote to the Secretary of the Treasury, as herein stated, of his own motion and paid said sum as taxes, without demand or suggestion made to him except as herein stated. He never knew the defendant and has never had the matter of payment of said tax brought to his attention in any way by the defendant or any agent of the defendant.

27 About one month after the death of said Sarah N. Wool, the defendant called on said Hawley for aid in the matter of collecting the tax due from the estate of said John E. Wool.

On or about the first day of August, 1873, said Hawley delivered to said Sanborn the draft hereinbefore referred to, which draft he, said Hawley, had received from said Morgan.

On the third day of August, 1873, said defendant enclosed said draft to the Secretary of the Treasury in a letter of which the following is a copy:

NEW YORK, *August* 3, 1873.

SIR: Referring to the contract made by me with the Hon. George S. Boutwell, late Secretary of the Treasury, bearing date August 13, 1872, and as amended by the agreement October 30, 1872, I have the honor to report that Asher R. Morgan, executor of the estate of General John E. Wool, deceased, late of Troy, N. Y., and one of the parties named in my schedule accompanying said contract, has paid to me the sum of $14,668, being the full amount of taxes due the Government by him arising from the legal assessment on legacies and successions of said trust, and which has never before been paid. I herewith enclose said sum and respectfully request that one-half of the same shall be paid into the Treasury to the credit of the Secretary of the Treasury, and that the remaining half thereof shall be paid to me in accordance with the terms of my said contract.

Please transmit receipt to Mr. Morgan, No. 7 Beekman street, New York.

Very respectfully,

JOHN D. SANBORN.

Hon. WM. A. RICHARDSON,
Secretary of the Treasury, Washington, D. C.

28 On the 9th day of August, 1873, the Secretary of the Treasury enclosed said draft of said Asher R. Morgan, together with other

drafts and certificates of deposit, to the Treasurer of the United States, with a letter, of which the following is a copy:

TREASURY DEPARTMENT,
Washington, D. C., August 9, 1873.

SIR: I enclose herewith for collection and deposit to my special credit on account of moneys received and paid under the first section of the legislative, executive, and judicial appropriation act, approved May 8, 1872, the following drafts, indorsed payable to your order:

Draft No. , drawn on the United States Trust Company, of New York City, by Asher R. Morgan, dated August 1, 1873, for $14,668.

Draft No. 692, drawn on National Bank of Commerce, of New York City, by George Bliss, dated August 7, 1873, for $11,149.34.

Certificate of deposit No. 993, of the Marine National Bank, New York City, for $176.70, dated August 1, 1873.

Certificate of deposit of Mechanics' Bank of Brooklyn, N. Y., No. 1500, for $2,412, dated July 3, 1873.

Draft No. 9936, drawn on Bank of New York by Second National Bank of Cleveland, Ohio, July 31, 1873, for $3,535.74.

Certificate of deposit of Mechanics' National Bank of New York City, No. 2542, for $61, dated August 6, 1873.

29 The entire sets of c. d's covering these amounts should be sent to this office.

Very respectfully,

WM. A. RICHARDSON,
Secretary.

Hon. F. E. SPINNER,
Treasurer of United States.

On the 15th day of August, 1873, the Treasurer of the United States delivered to the Secretary of the Treasury certificate of deposit No. 26, enclosing the same in a letter, under date of said August 15, 1873, of which letter and certificate of deposit, respectively, the following are copies:

TREASURY OF THE UNITED STATES,
Washington, August 15, 1873.

SIR: For drafts and certificates of deposit received, as per yours of 9th instant, I enclose, in triplicate, my certificate of deposit No. 26, on account of Secretary of the Treasury, account of moneys received and paid under first section of legislative, executive, and judicial appropriation act May 8, 1872, $32,002.68. Collection of checks and certificates described on back of Treasurer's certificate.

Very respectfully,

F. E. SPINNER,
Treasurer of the United States.

Hon. W. A. RICHARDSON,
Secretary of the Treasury.

30 No. 26.]

TREASURY OF THE UNITED STATES,
Washington, D. C., August 15, 1873.

I certify that the Secretary of the Treasury (proceeds of drafts and certificates described on back of this certificate) this day deposited to the credit of the Secretary of Treasury thirty-two thousand and two 68-100 dollars, on account of moneys received and paid under the first section of legislative, executive, and judicial appropriation act approved May 8, 1872, for which I have signed triplicate receipts.

($32,002.68.)

F. E. SPINNER,
Treasurer of the United States.

A. R. Morgan, on United States Trust Company	$14,668.00
George Bliss, on National Bank of Commerce, New York	11,149.24
Certificate of deposit, Marine National Bank, New York	176.70
Certificate of deposit, Mechanics' National Bank, Brooklyn, N. Y.	2,412.00
Second National Bank, Cleveland, Ohio, on Bank of New York	3,535.74
Certificate of deposit, Mechanics' National Bank, New York	61.00
	$32,002.68

On the 16th day of August, 1873, the Secretary of the Treasury delivered to John D. Sanborn a draft on the Treasurer of the United States for $16,001.34, of which sum $7,334 was on account of the collections made of internal revenue from the estate of said John E. Wool, deceased. Said draft was enclosed in a letter under date of said August 16, 1873, of which letter and which draft the following, respectively, are copies:

31 TREASURY DEPARTMENT,
Washington, D. C., August 16, 1873.

SIR: Inclosed you will find my draft for $16,001.34, the same being on account of amount due you under your contract with the Secretary of the Treasury in the cases enumerated in your letters of the 1st, 3d, and 7th instants.

$16,001.34.

Very respectfully,

WM. A. RICHARDSON,
Secretary.

JNO. D. SANBORN,
Adams Express Office, Boston, Mass.

TREASURY DEPARTMENT,
Washington, D. C., August 16, 1873.

To the Treasurer of the United States, F. E. SPINNER, Esq.:

Pay to the order of John D. Sanborn $16,001.34, and charge the same to my special deposit account of moneys received and paid under the first section of the legislative, executive, and judicial appropriation act, approved May 8, 1872.

WM. A. RICHARDSON,
Secretary of the Treasury.

Countersigned:
J. H. ROBINSON,
Acting Solicitor of the Treasury.

The amount of this last-named draft was paid to the defendant by the Treasurer of the United States.

On the 16th day of August, 1873, the Secretary of the Treasury forwarded to said Asher R. Morgan a receipt for the payment of the internal-revenue taxes paid on said estate, of which receipt the following is a copy:

32

TREASURY DEPARTMENT,
Washington, D. C., August 16, 1873.

SIR: I hereby acknowledge the receipt, through John D. Sanborn, special agent, of the sum of fourteen thousand six hundred and sixty-eight dollars ($14,668.00), being the amount of taxes on legacies and successions due the Government from the estate of the late General John E. Wool, of Troy, N. Y.

Very respectfully,

WM. A. RICHARDSON,
Secretary.

To ASHER R. MORGAN, Esq.,
No. 7 Beekman St., N. York.

The United States has never refunded any part of the said sum collected as taxes from the estate of said John E. Wool and no demand to have the same refunded has ever been made. The taxes were paid without protest.

The court finds as matter of law, as follows, that is to say:

On the above state of facts plaintiff is entitled to recover in this action a judgment for the sum of seven thousand three hundred and thirty-four dollars with interest thereon at the rate of six per centum per annum from the 16th day of August, 1873, to the day when said judgment shall be entered.

G. M. CARPENTER, *J.*

33 This cause was thence continued to the present May term, A. D. 1886, and now, to wit, Aug. 14, the Honorable Thomas L. Nelson, district judge, sitting, it is considered by the court that the said United States, plaintiffs, recover of the said John D. Sanborn, defendant, the sum of thirteen thousand and fifty-two dollars and eight cents, damages and costs of suit, taxed at eighty-three dollars and thirty cents.

The following bill of exceptions is allowed by the court and filed before the entry of judgment herein, and made a part of the record in this cause.

Defendant's bill of exceptions.—Filed Apr. 6, 1886.

This cause coming on to be tried by the court, the plaintiff and defendant, by their attorneys, having filed a stipulation in writing in this cause waiving a jury, the plaintiff to maintain the issue on its behalf joined gave in evidence to the court a copy of a contract in writing, duly certified by the Secretary of the Treasury of the United States, dated August 13, 1872, made between William A. Richardson, Acting Secretary of the Treasury of the United States, and the defendant, John D. Sanborn, a true copy of which is embodied in the findings of fact made by the court and

filed in this cause and made a part of the record, to which the defendant refers and makes a part of this, his bill of exceptions.

The plaintiff also gave in evidence to the court a copy of a contract in writing, duly certified by the Secretary of the Treasury of the United States, dated October 30, 1872, made by and between William A.
34 Richardson, Secretary of the Treasury of the United States, and the defendant, John D. Sanborn, supplementary to said contract, dated August 13, 1872, as aforesaid, a true copy of which supplementary contract is included in the findings of fact made by the court, and filed in this cause and made a part of the record, to which the defendant refers, and makes it a part of this, his bill of exceptions.

The plaintiff also gave evidence to the court proving that Major-General John E. Wool, late of Troy, New York, died on the 10th day of November, 1869, leaving a large estate, and leaving Sarah N. Wool, his widow, surviving him, and that his last will and testament was duly admitted to probate in Rensselaer County, New York, on the 8th day of February, 1870, and that letters testamentary under said will were duly issued in said county on the 4th day of March, 1870, to John A. Griswold and Asher R. Morgan, and that Sarah N. Wool died on the 7th day of May, 1873.

And the plaintiff also gave in evidence to the court a duly certified copy of said last will and testament and codicils thereto, a true copy of which is included among the findings of fact made by the court and filed in this cause and made a part of the record, to which the defendant refers, and makes a part of this his bill of exceptions.

The plaintiff also gave evidence to the court tending to prove that within a few weeks after the death of Sarah N. Wool, the widow of said John E. Wool, deceased, said Morgan wrote to the Secretary of the Treasury, asking him to refer the question of succession and legacy tax on the estate of said John E. Wool, deceased, to some person in authority
35 to pass upon the liability of said Morgan to pay taxes on said estate, and before the 31 day of July, 1873, he received a letter from the Secretary of the Treasury referring all questions relating to said matter to Lucian Hawley, supervisor of internal revenue, with whom said Morgan subsequently had several interviews relative to said taxes, and to whom on the 1st day of August, 1873, in payment of the same he gave his check payable to William A. Richardson, Secretary of the Treasury, or order, for fourteen thousand six hundred and sixty-eight dollars ($14,668), and that said check was by said Hawley turned over to the defendant, John D. Sanborn, by whom it was forwarded to the Secretary of the Treasury, who caused the same to be collected and transmitted, one-half of the proceeds of the same, to John D. Sanborn in a draft for sixteen thousand and one dollars and thirty-four cents ($16,001.34), made up of seven thousand three hundred and thirty-four dollars, one-half of the proceeds of said check drawn by said Morgan, and other items, the Secretary of the Treasury transmitting the same in a letter of which the following is a true copy:

TREASURY DEPARTMENT,
Washington, D. C., Aug. 16th, 1873.

SIR: Inclosed you will find my draft for sixteen thousand one $\frac{34}{100}$ dollars, the same being on account of amount due you under your contract

with the Secretary of the Treasury, in the cases enumerated in your letters of the 1st, 3d, and 7th instants.

Very respectfully,

WILLIAM A. RICHARDSON,
Secretary.

$16,001.34.

JOHN D. SANBORN,
Adams Express Office, Boston, Mass.

36 The letter above referred to by the Secretary of the Treasury as received from the defendant Sanborn, and dated August 3, 1873, is in the following words and figures, to wit:

NEW YORK, *August* 3, 1873.

SIR: Referring to the contract made by me with the Hon. George S. Boutwell, late Secretary of the Treasury, bearing date August 13, 1872, and as amended by the agreement October 30, 1872, I have the honor to report that Asher R. Morgan, executor of the estate of Gen. John E. Wool, deceased, late of Troy, N. Y., and one of the parties named in my schedule accompanying said contract, has paid to me the sum of fourteen thousand six hundred and sixty-eight dollars, being the full amount of taxes due the Government by him, arising from the legal assessments on legacies and successions of said trust, and which has never before been paid.

I herewith enclose said sum, and respectfully request that one-half of the same shall be paid into the Treasury to the credit of the Secretary of the Treasury, and that the remaining half thereof shall be paid to me in accordance with the terms of my said contract.

Please transmit receipt to Mr. Morgan, No. 7 Beekman st., New York.

Very respectfully,

JOHN D. SANBORN.

Hon. WM. A. RICHARDSON,
Secretary of the Treasury, Washington, D. C.

37 The plaintiff also gave evidence to the court tending to prove that said Morgan paid said taxes without demand or suggestion made to him except as hereinbefore stated; that he never knew the defendant, and that he never had the matter of payment of said tax brought to his attention in any way by the defendant or any agent of the defendant.

And one of the witnesses for the plaintiff also gave evidence on cross-examination to the court tending to prove that two men claiming to be employees in the office of Lucian Hawley, supervisor, as aforesaid, some time after the death of Sarah N. Wool, widow of said John E. Wool, deceased, called on John T. Masters, collector of internal revenue at Troy, N. Y., and had conversation with him in relation to the internal-revenue taxes due to the United States on the estate of said John E. Wool, deceased, and that on the 31st day of July, 1873, and not before, said Masters took his first step towards enforcing the collection of said taxes by writing to the executor, Asher R. Morgan, a letter directing him to make the proper returns in relation to said estate, as required by law.

And the plaintiff having rested, the defendant gave in evidence to the court copies of two letters, duly certified by the Secretary of the Treasury of the United States, addressed to supervisors and collectors of internal revenue, and dated respectively February 3, 1873, and October 15, 1873, true copies of which letters are included in the findings of fact made by the court and filed in this cause, and made a part of the record, and to which the defendant refers and makes part of this his bill of exceptions.

38 The defendant also gave evidence to the court tending to prove that the defendant, about one month after the death of Sarah N. Wool, the widow of said John E. Wool, deceased, called on said Lucian Hawley, supervisor of internal revenue as aforesaid, for aid in the matter of collecting the tax due from the estate of the said John E. Wool.

And the defendant further gave to the court the evidence of George W. Stow, tending to prove that he (Geo. W. Stow) was, during the summer of 1873, employed in the office of said Lucian Hawley, supervisor of internal revenue as aforesaid, whereupon counsel for defendant asked said witness to state what, if anything, he did under the instructions of said Supervisor Hawley in the collection of the internal-revenue taxes due the United States from the estate of John E. Wool, deceased, to which question counsel for the plaintiff made his objection, and the court sustained said objection; whereupon counsel for the defendant then and there excepted to the ruling of the court sustaining said objection, which exception the court allowed and noted the same on his minutes, and counsel for the defendant, before the final submission of the cause to the court, prayed the court to sign, seal, and make a part of the record this his first bill of exceptions, which is done now for the' this sixth day of April, 1886.

G. M. CARPENTER, *J.*

39 Evidence having been given to the court, as set forth in defendant's first bill of exceptions, to all which defendant refers and makes part of this his second bill of exceptions to the same extent as if it were all repeated herein, counsel for defendant then made the offer to the court if evidence, by the witness Geo. W. Stow, tending to prove that immediately subsequent to the defendant calling on Lucian Hawley, supervisor as aforesaid, for aid in collecting the internal-revenue taxes from the estate of John E. Wool, deceased, he, the said Stow, under the instructions of said Hawley, called on said Asher R. Morgan, executor as aforesaid, and demanded payment to said Hawley, supervisor as aforesaid of said taxes, and that subsequently said Morgan called upon said Hawley, in pursuance of such demand made by said Stow, and arranged with said Hawley for the payment of said taxes, and paid the same by check as aforesaid to said Hawley on the 1st day of August, 1873; and further, that he, said Stow, in company with another employee in the office of said Hawley, did, prior to the 30 of July, 1873, call upon John T. Masters, collector of internal revenue at Troy, N. Y., under instructions from said Hawley, and had a conversation with said Masters in relation to the collection of the internal-revenue taxes due to the United States from the estate of said John E. Wool, deceased; to which offered evidence plaintiff, by its counsel, objected, which objection the court sustained and to which ruling of the court sustaining such objection the defendant, by his counsel, then and there excepted, and the court allowed the exception and noted

the same on its minutes; and the defendant, before the final sub-
40 mission of the case to the court, prayed the court to sign, seal, and make part of the record this his second bill of exceptions, which is done now for them this sixth day of April, 1886.

G. M. CARPENTER, *J.*

The following bill of exceptions is allowed by the court and filed as of a date prior to the entry of judgment therein, and made part of the record in this cause:

Plaintiff's exceptions.—Filed as of Aug. 14, 1886.

After judgment was ordered for the United States in this case, which is an action at law, brought by them for money had and received, the attorney for the United States submitted to the clerk a bill of costs, which was objected to by the defendant; all of which appears by the clerk's report of taxation of costs, a copy whereof is hereto annexed and is made a part of these exceptions. The attorney for the United States objected to the disallowance of any part of the costs claimed by him and appealed from the clerk's taxation, and the questions raised by the clerk's report were presented to the circuit court, the honorable Horace Gray, associate justice, and the honorable LeBaron B. Colt, circuit judge, sitting. The circuit court ruled that nothing could be taxed in the bill of costs for the travel or attendance of the Government clerks, and the plaintiffs except to said ruling.

GEO. M. STEARNS,
U. S. Att'y, for Plaintiffs.

The foregoing exceptions are allowed.

LEBARON B. COLT,
[Written in lead pencil:] *Circuit Judge.*

41 Report of clerk on taxation of costs.

A hearing upon the bill of costs submitted in behalf of plaintiffs by the assistant district attorney, Charles Almy, jr., and which is hereto annexed, has been had before the clerk. Frank L. Washburn, esq., appeared for the defendant and submitted the annexed objections.

I allow items 1, 2, 3, 4, 12, 13, 14, and 15, amounting to $54.50, the same appearing to me to be correctly taxed, and the defendant not presenting any specific objections thereto upon which I ought to rule.

Item 5 is not specifically objected to, but the following objections are fairly to be inferred from the objections taken to items 6, 7, 8, and 9:

1. That it does not appear that this witness was subpœnaed within a hundred miles of the place of trial or within this district, and that unless subpœnaed a witness can not be allowed travel, and can be allowed attendance only for the days he is present and testifies.

2. That in no event can a witness be allowed travel for more than one hundred miles to and from the place of trial unless he actually travels more than that distance within the limits of the district within which the trial is had.

I am aware that objections similar to these have been sustained by some of the U. S. courts and overruled by others, and, in this conflict of de-

cisions, I am of the opinion that the proper construction of the law in this regard has not been settled by the decisions of the courts. In this district a necessary and material witness has always been allowed "for each day's attendance in court one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing, and five cents a mile for returning," whether subpœnaed or not, and whatever the distance travelled may have been. I think, however, that the weight of authority is now to the following effect:

(1) A person attending court as a witness is entitled to travel and attendance whether he attends voluntarily at the request of a party to a cause or pursuant to a subpœna duly issued and served upon him.

(2) A witness is entitled to mileage for the number of miles he actually travels in going from his place of residence to the place of trial and in returning from the place of trial to his place of residence, within the limits of the district in which the trial is had.

(3) A witness residing without the district in which the trial is had, is entitled to mileage from and to his place of residence, not exceeding one hundred miles each way, unless a greater distance is actually and necessarily travelled within the limits of said district.

42

(4) Witness fees as above, actually paid to a witness by the prevailing party in a cause, are taxable in costs in favor of such prevailing party.

Applying these principles I allow of item 5—

On account of the witness Eugene Seitz 4 days' attendance..	$6
Travel 200 miles	10
Total..	$16

and disallow the balance of said item 5.

Items 6, 7, 8, & 9 are for the necessary expenses of clerks in the Internal Revenue Office or in the War Department in Washington, who were sent away from their places of business as witnesses for the Government in this case. These clerks were entitled to the payment of their necessary expenses by the United States under section 850, R. S., but in taxing costs in favor of the United States, I do not think a more favorable rule should be applied than in taxing costs for other parties to suits. If an individual, having a person in his employ residing in Washington, should be a party to a suit here, and should desire the attendance of such employé as a witness here, he could pay such employé for his services and expenses whatever sum might be agreed upon between them; but, in taxing his costs, having paid the witness, his employé, more than his statute fees, and being thereby subrogated to all the rights of the witness as to witness fees, he could only include in his costs the fees to which the witness would be entitled under the statutes.

Applying this rule to the United States, I allow of items 6, 7, 8, & 9 the following:

Item 6. Account of witness W. J. Morris:		
4 days' attendance	$6	
Travel	10	$16
Item 7. Account of witness W. J. Morris:		
4 days' attendance	6	
Travel	10	16

Item 8. Account of witness John T. Masters:		
4 days' attendance	$6	
Travel	10	$16
Item 9. Account of witness John T. Masters:		
5 days' attendance	7.50	
Travel	10.00	17.50
Total		$81.50

and I disallow the balance of said items.

43 I allow items 10 and 11, the same being for the necessary orders in the payment of said witnesses, amounting to $2.00.

Summary of costs allowed by clerk upon the hearing before him:

Items 1, 2, 3, 4, 12, 13, 14, & 15, no specific objection appearing	$54.50
Item 5 (Eugene Seitz)	16.00
Items 6, 7, 8, & 9 (Government employés)	81.50
Items 10 & 11 (witness orders)	2.00
Total	$154,00

The attorney of the United States objected to each of my rulings, disallowing any part of items of taxation claimed by him and appealed therefrom to the court.

Respectfully submitted,

JOHN G. STETSON, *Clerk.*

Plaintiffs' costs as claimed.

	Items.	
Writ & entry	(1)	$2.25
Marshal's fees, services, &c	(2)	4.40
Continuances Oct. T., 1883, to Oct. T., 1885, 4 terms, at 30c.	(3)	1.20
Clerk's fees: Fil	$1.50	
D. E	2.25	
D. F	3.00	
Sw'r'g wit	.60	
Record	20.00	
	(4)	27.35
Witness fees, as per certificates:		
Eugene Seitz, 416 miles, 4 days	(5)	26.80
W. J. Morris, clerk, Revenue Office, actual expenses	(6)	53.60
2 trs. " " " " " "	(7)	50.45
44 John T. Masters, clerk War Department, actual expenses	(8)	$52.90
2 Trs. John T. Masters, clerk War Department, actual expenses	(9)	55.25
Orders to pay witnesses, 5, at 15c	(10)	.75
5 copies of same	(11)	1.25
Attorney fee	(12)	10.00
" " on deposition of Morgan	(13)	2.50
Commissioner's fees, taking deposition of J. A. Shields, com.	(14)	5.80
Commission	(15)	1.00
Total		$295.50

Defendant's objections to memorandum taxation of costs.

The said defendant hereby objects to the hereto annexed memorandum taxation of costs in said case, particularly to items No. 6, 7, 8, and 9, and says the same ought not to be taxed and allowed as costs of suit, because, 1st, there is no provision of law authorizing the taxation of the travelling and other expenses of employés of the United States, the said plaintiffs, who were used as witnesses in said case, as costs against said defendant, when said witnesses come from without the district of Massachusetts; and travel can only be taxed as costs against the defendant for 100 miles or the number of miles to the State line by the route travelled.

2. The law fixing the amount which the United States shall pay its employees for travelling expenses and subsistence when ordered to attend court is not a guide to the clerk in taxing costs against Sanborn.

45 3. That costs cannot be taxed against him for mileage of witnesses unless the latter are subpœnaed within the district for which the court his held, or within one hundred miles of the place where the court is held, and then only for the mileage of the witness actually travelled in going from the place where he is subpœnaed to the court and in returning to the same place.

4. That costs cannot be taxed on account of witnesses who appeared without subpœna, save for the days they were present and testified; said costs to be taxed at the rates usually taxed, irrespective of the fact that said witnesses were in the employment of the Government.

By his attorney,

FRANK L. WASHBURN.

A true record.
Attest:

JOHN G. STETSON,
Clerk.

46 The following is the statement of the case and opinion of the court on the question of costs in this case:

Circuit court of the United States, district of Massachusetts.

UNITED STATES
v.
JOHN D. SANBORN. } No. 2188. Law docket.

Before Gray and Colt, JJ.

Statement of the case on costs.

Clerk's report of taxation of costs after judgment for the United States in an action at law brought by them for money had and received.

The bill of costs submitted by the attorney for the United States included the following items, duly certified, of sums paid to witnesses:

First. For a witness who attended court without a subpœna, four days' attendance, at one dollar and fifty cents a day, and four hundred and sixteen miles travel from and to his residence at Troy, in the State of New York, at five cents a mile; in all, $26.80.

Second. For actual and necessary expenses in going, attending court, and returning, of four clerks, two in the War Department and two in the Internal Revenue Office at Washington, sent from their places of business as witnesses for the Government; in all, $212.20.

The defendant objected that no costs could be taxed against him for witnesses who attended without a subpœna, save for the days when they were present and testified; nor for travel of witnesses beyond one hundred miles and beyond the limits of the district in which the court was held; nor for any travelling or other expenses of witnesses in the employ of the United States.

47 "In this district," as the clerk stated in his report, "a necessary and material witness has always been allowed 'for each day's attendance in court, one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing, and five cents a mile for returning,' whether subpœnaed or not, and whatever the distance may have been."

The clerk followed this practice, so far as to allow four days' attendance and one hundred miles' travel each way of the first witness, amounting in all to $16; but, in deference to what he supposed to be now the weight of authority, disallowed travel beyond one hundred miles and without the limits of the district.

The clerk allowed a like amount for attendance and travel of each of the Government clerks who testified as witnesses, and disallowed the amounts charged for their expenses. His reasons for this, as stated in his report, were that under § 850 of the Revised Statutes these clerks were entitled to be paid their necessary expenses by the United States; but that in taxing costs no more favorable rule should be applied in favor of the United States than in favor of other parties to suits; that if an individual having a person in his employ residing in Washington should be a party to a suit here, and should desire his attendance as a witness, he could pay him for his services and expenses whatever sum might be agreed upon between them, but in taxing costs, having paid the witness more than his statute fees, and having thereby become subrogated to his right to those fees, could include the amount of those fees only.

The attorney for the United States objected to the disallowance of any part of the costs claimed by him, and appealed from the clerk's taxation; and the questions presented by the clerk's report were argued by Charles Almy, jr., assistant district attorney, for the United States, and were submitted by Frank L. Washburn, for the defendant, upon the objections filed by him before the clerk.

48 *Opinion of the court.—August* 14, 1886.

GRAY, J.—The report of the clerk presents for our determination two questions of costs; the one, of the amount taxable, under § 848 of the Revised Statutes, for the travel of an ordinary witness who, without having been summoned, has travelled from and to the place of his residence, more than one hundred miles off, and in another State and district; the other, of the amount taxable, under § 850, for travel or expenses of Government clerks.

Upon the first question the principal authority is Prouty v. Draper, 2 Story, 199, decided by this court in 1842, which was an action at law for

the infringement of a patent, and in which, as the report clearly implies, and the papers on file conclusively show, the witnesses in question, whose travel from their places of residence to the court and back was taxed in the bill of costs, resided in another district and more than one hundred miles from the place of trial, and attended without having been summoned. Mr. Justice Story, in delivering judgment, after referring to the Judiciary Act of September 24, 1789, c. 20, § 30, which allowed the testimony of witnesses living more than one hundred miles from the place of trial to be taken by deposition, said: "The act is not peremptory, that under such circumstances the depositions of the witnesses shall be taken and used, but only that they may be taken and used. It is, therefore, a mere option given to the party who wishes to use the testimony of the witnesses. In many cases, the presence of the witnesses in person, and their oral testimony on the stand, may be indispensable to the true ex-
49 position of the merits of the case. No deposition would or could meet all the exigencies which might arise from the varying character of the evidence, or the necessity of instant explanation of circumstances not previously known or understood. The character of the case, too, may be so dependent upon scientific principles, or on a minute description of mechanism, as to be almost impracticable to be presented to a jury, except by the aid of oral testimony, illustrating the principles of mechanism. In no class of cases is this more forcibly felt than in the trial of cases like the present, for infringement of patent rights. There is no pretence in the present case that the witnesses were brought here for the purposes of oppression, or without necessity, for the purpose of swelling the costs of the litigation. In my judgment, therefore, there is no ground to say that the full costs of the personal travel and attendance of the witnesses ought not to be allowed in the costs. Unless my memory deceives me, the same question has been presented to this court in several instances before the present, and it has uniformly received the same determination. There are numerous cases in the English reports in which allowances have been made for the travel and attendance of witnesses who have come from foreign countries for the purposes of the trial; and yet we all know that in such cases, through the instrumentality of a court of equity (and now in many cases of a court of law) the testimony of such witnesses might be obtained upon a commission. Indeed, since the statute of 1 Will. IV., c. 22, giving authority to the courts of law to issue commissions to take the examinations of witnesses abroad, it is still a mere matter of discretion with the court, if the witnesses are actually brought from abroad, whether they will allow the expenses of the witnesses or only the costs of a commis-
sion. This seems to be putting the whole doctrine upon a sound and
50 rational foundation; and enables the courts at once to accomplish the purposes of justice and to prevent the accumulation of unnecessary or extravagant expenses."

As early as 1804 the circuit court for the District of Columbia held that the fees of a witness who attended at the request of the attorney for the United States, without having been summoned, were taxable costs. United States v. Williams, 1 Cranch C. C., 178. And in one of the English cases cited by Mr. Justice Story the fact that the witness resided beyond the reach of a subpœna, and therefore could not have been compelled to come, was considered by Lord Chief-Justice Tindal a reason for allowing his

travelling expenses in the bills of costs. Lonergan v. Royal Exchange Assurance, 7 Bing., 725; S. C., 5 Moore & Payne, 447, 805, 811; 1 Dowl., 223, 233, 235.

The rule affirmed in Prouty v. Draper was again applied by Mr. Justice Story in 1844 in Whipple v. Cumberland Co., 3 Story, 84, and was recognized and approved by Mr. Justice Woodbury in 1846 in Hathaway v. Roach, 2 Woodb. & Min., 63, 73, and has ever since been acted on in this district.

The decisions of Justices Story and Woodbury were made under the act of February 28, 1799, c. 19, § 6, in which the provision was in this form:

"The compensation to jurors and witnesses in the courts of the United States shall be as follows, to wit: to each grand and other juror, for each day he shall attend in court, one dollar and twenty-five cents; and for travelling, at the rate of five cents per mile from their respective places of abode to the place where the court is holden, and the like allowance for returning; to the witnesses summoned in any court of the United States, the same allowance as is above provided for jurors." 1 Stat. 626.

They evidently considered that the general description at the beginning of the section of the persons to be compensated as "witnesses in the
51 courts of the United States" was not narrowed by the use of the words "witnesses summoned," towards the end of the section, but included witnesses not summoned, and even those residing so far from the place of trial that they could not have been summoned or compelled to attend.

The same view applies with increased force to the language of the act of February 26, 1853, c. 80, § 3 (10 Stat., 167), repeated in § 848 of the Revised Statutes, by which witnesses' fees are declared to be "for each day's attendance in court, or before any officer pursuant to law," one dollar and fifty cents, and five cents a mile for going "from his place of residence to the place of trial or hearing," and five cents a mile for returning; and neither the word "summoned" nor any equivalent word is used, except in a clause added to prevent the multiplication of fees "when a witness is subpœnaed in more than one cause between the same parties at the same court."

In the phrase "for each day's attendance in court, or before any officer pursuant to law," the words "pursuant to law" would seem to have been inserted, not to restrict or qualify the effect of "attendance in court," but rather to limit the attendance "before any officer" to attendance before such magistrates, commissioners, and other officers as are authorized by law to take testimony. But assuming them to apply to both classes of cases, it is only "attendance pursuant to law," not "being summoned pursuant to law," that is required to entitle the witness to his fees. A witness who in good faith comes to court to testify in a pending suit, whether he comes in obedience to a subpœna, or at the mere request of one of the parties, attends pursuant to law, and while coming, attending, and returning is privileged from arrest on civil process, even if he comes from abroad and has no writ of protection. Walpole v. Alexander, 3 Doug., 45; May v. Shumway, 16 Gray, 86; Person v. Grier, 66 N. Y., 124; Parker v. Hotchkins, 1 Wall., jr., 269, 274; Larned v. Griffin, 12 Fed. Rep., 590.

52 The only object of a subpœna is to compel the witness to at-

tend. The service of a subpœna is in the interest of the party who desires the attendance, and not in that of the other party. A witness who has not been served with a subpœna can not indeed be attached for not attending. But if he is willing to attend, and does attend, without a subpœna, the service of a subpœna would be superfluous, and would only increase the costs, without any benefit to either party.

The examination of the witness in the presence of the tribunal that is to passs upon his testimony is often quite as important to the party against whom he is called as to the party calling him. And the statutes of the United States from the beginning have declared that the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as otherwise specially provided. (Act of September 24, 1789, c. 20, § 30, 1 Stat., 88; Rev. Stats., § 861.)

If the witness comes before the court under circumstances and for a purpose which warrant the payment and taxation of his fees for attendance and travel, section 848 of the Revised Statutes, like the act of 1853, directs that the travel shall be computed from his "place of residence." These words, unrestricted in respect of distance or of district, must be considered, as the like general words "their separate places of abode" in the act of 1799 were considered by Mr. Justice Story and Mr. Justice Woodbury to be imperative, and to warrant the taxation of fees for travel from and to the residence of the witness in any part of the United States, whenever his personal attendance in court may reasonably be required in the interests of justice.

Neither section 876 of the Revised Statutes, which re-enacts the statute of March 2, 1793, c. 22, § 6 (1 Stat., 335), and allows subpœ-
53 nas for witnesses in civil actions to run from one district into another, only when the witnesses do not live more than one hundred miles from the place where the court is held, nor section 863, which re-enacts provisions of the statutes of September 24, 1789, c. 20, § 30 (1 Stat., 88), and May 9, 1872, c. 146 (17 Stat., 89), and permits, without requiring, the testimony of witnesses living at a greater distance to be taken by deposition, has, in our judgment, any bearing upon the question before us. The object of the one is to protect the witness against being compelled to go far from home against his will; and the object of the other is to provide a means by which the party may not wholly lose the benefit of his testimony if he can not, or will not, attend court. They do not render the voluntary attendance, the reasonable compensation, or the taxation of the fees, of any witness, unlawful.

The rulings in other circuits, after giving them the consideration due to decisions of courts of co-ordinate jurisdiction, do not present to our minds any sufficient reason for overruling the decisions of our predecessors, disturbing the practice long established here, and departing from what appears to us to be the fair meaning of the statutes.

The leading cases in other circuits are Dreskill v. Parish, 5 McLean, 213, 241, in 1851, and Anon., 5 Blatchford, 134, in 1863, each of which would appear from the report to have been decided summarily, and without being aware of the previous decisions in England and in this circuit.

In Dreskill v. Parish, Mr. Justice McLean ruled that the fees of a witness who attended voluntarily, without having been summoned, could not

be taxed. But the only reasons assigned by the learned justice were that the attendance of such a witness could not have been compelled by attachment, and that the act of 1799 (under which the case arose) had provided only for the compensation of witnesses summoned, and "a wit-
54 ness not summoned, of course, can receive no compensation." Under the act of 1853, there have been conflicting decisions of district judges in the same circuit, Judge Leavitt, in 1862, holding that the fees for travel of such a witness could not be taxed, and Judge Withey, in 1869, holding that they could. Woodruff v. Barney, 2 Fisher Pat. Cas., 244; S. C., 1 Bond, 528; Anderson v. Moe, 1 Abbott (U. S.), 299. The disallowance of such fees by Judges Drummond and Blodgett, in 1870, in Sawyer v. Aultman & Taylor Co., 5 Bissell, 165, was governed by a standing rule of court prohibiting the clerk from taxing the costs of any witnesses except those regularly summoned. The opinion of Judge Sawyer, in 1871, in Spalding v. Tucker, 2 Sawyer, 50, disallowing costs for the travel of witnesses coming more than one hundred miles and from another district, was based upon Dreskill v. Parish and Woodruff v. Barney, and upon the theory (in which, for the reasons already stated, we cannot concur) that a witness who has not been served with a subpœna does not attend pursuant to law.

The whole report of the anonymous case in 5 Blatchford, 134, is only this brief memorandum: "In this case, which was a question as to the taxation of costs, Shipman, J., with the concurrence of Mr. Justice Nelson, held that travelling fees to a witness were allowable only to the extent a subpœna would run; that is, for any distance within the district, but for not exceeding one hundred miles from the place of trial, unless the distance was wholly within the district." That ruling appears to have been followed, without further discussion, as having fixed the practice in the second circuit so far as not to permit the taxation of fees for travel beyond the limits within which the witness could have been summoned. Beckwith v. Easton (1870), 4 Benedict, 357; The Leo (1872), 5 Benedict, 486. But we are unable to reconcile it in principle with
55 the uniform course of decision in that circuit that the fact that a witness had not been summoned did not prevent the taxation of his fees for travel and attendance under the act of 1853. Cummings v. Akron Co. (1869), 6 Blatchford, 509; Dennis v. Eddy (1874), 12 Blatchford, 195. There seems to us to be quite as much reason for taxing the travel of a witness from the place of his residence to the place of trial in the case in which he could not have been summoned as in the case in which he might have been and was not.

The cases in the courts of the several States depend too much upon local statute or usage to be of much assistance in the interpretation of the acts of Congress.

There being no evidence or suggestion that the personal attendance of the witness, who resided at Troy, in the State of New York, was unnecessary or unreasonable, his travel should be taxed for the whole distance between his residence and the place of trial.

The other question presented by the report is quite distinct and is governed by § 850 of the Revised Statutes, which is as follows:

"When any clerk or other officer of the United States is sent away from his place of business as a witness for the Government his necessary

expenses, stated in items and sworn to, in going, returning, and attendance on the court, shall be audited and paid, but no mileage or other compensation in addition to his salary shall in any case be allowed."

The meaning of this provision, which is a substantial re-enactment of the similar one in the act of February 26, 1853, c. 80, § 3 (10 Stat., 167, 168), appears to us too clear to admit of doubt.

Private persons are allowed witness fees, because of the interruption of their own business, but a clerk or other officer of the United States receives from the Government a salary as a full compensation for the per-
56 formance of all services and duties which he may lawfully be required to perform for the Government, whether at the usual place or elsewhere. If he is sent away for any public object the Government pays his necessary expenses. If he is sent away as a witness, those expenses are to be "audited and paid;" that is to say, by the proper Executive Department or officer. "Audited" is not used to designate the taxation of costs by a court, and the statute peremptorily forbids the allowance to him of any mileage or other compensation in addition to his salary. In short, the United States, when they send one of their clerks to testify as a witness for the Government, do not, on the one hand, oblige him to pay out of his own pocket the expense to which he is thereby put, nor, on the other hand, permit him to receive or compel the adverse party to pay him any fees, for the benefit either of the witness or of the United States.

It follows that nothing can be taxed in the bill of costs for the travel or attendance of the Government clerks.

Taxation modified.

57 Circuit court of the United States, district of Massachusetts.

UNITED STATES
v.
JOHN D. SANBORN. } No. 2188. Law docket.

Assignment of error and prayer for reversal.—(*Filed Oct.* 9, 1886.)

The plaintiff having been allowed a bill of exceptions to the ruling of the circuit that nothing could be taxed in the bill of costs of the plaintiff for the travel and attendance of the Government clerk, assigns the following error and prays that the judgment be reversed so far as the taxation of costs is concerned and not otherwise:

1st. That the circuit ruled and decided that upon the facts set forth in the record nothing could be taxed in the plaintiff's bill of costs for the travel or attendance of the Government clerks, whereas the court should have ruled that the travel and attendance of said clerk should be taxed in plaintiff's bill of costs.

GEO. M. STEARNS,
U. S. Att'y.

58 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record of said circuit court in the cause entitled No.

2188, United States of America, plaintiffs, v. John D. Sanborn, defendant, lately determined in said circuit court, and of all proceedings therein, and of the opinion of the court and of the assignment of errors and prayer for reversal filed therein by the plaintiffs.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this ninth day of October, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and eleventh.

[SEAL.] JOHN G. STETSON, *Clerk.*

59 *Bond on writ of error.*

Know all men by these presents, that we, John D. Sanborn, of Rockport, in the county of Essex, State of Massachusetts, as principal, and George B. Loring, of Salem, in said county, and Frank Jones, of Portsmouth, State of New Hampshire, as sureties, are held and firmly bound unto the United States of America in the full and just sum of sixteen thousand (16,000) dollars, to be paid to the said United States of America; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated the seventh day of October, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately, at a circuit court of the United States within and for the district of Massachusetts in a suit depending in said court between aid United States of America, as plaintiff, and said John D. Sanborn, as defendant, in which suit judgment was rendered against the said John D. Sanborn; and the said John D. Sanborn having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October current. Now the condition of the above obligation is such that if the said John D. Sanborn shall prosecute his said writ of error to effect, and answer all damages and costs, if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

JOHN D. SANBORN. [L. S.]
GEO. B. LORING. [L. S.]
FRANK JONES. [L. S.]

Signed, sealed, and delivered in presence of—

_____ _____.

Approved:

LE BARON B. COLT,
U. S. Circuit Judge, First Judicial Circuit.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:

JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

60 The United States of America to the United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States within and for the district of Massachusetts, wherein John D. Sanborn, of Rockport, in the district of Massachusetts, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Le Baron B. Colt, this ninth day of October, in the year of our Lord one thousand eight hundred and eighty-six.

LE BARON B. COLT,
U. S. Circuit Judge, First Judicial Circuit.

Sufficient service of this citation is admitted.

GEO. M. STEARNS,
U. S. Att'y.

(Indorsement on cover:) No. 224. The United States, plaintiff in error, vs. John D. Sanborn. No. 225. John D. Sanborn, plaintiff in error, vs. The United States. Massachusetts C. C., U. S. Filed October 19, 1886.